APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19,622
SOUTH-EAST COAL COMPANY,
Plaintiff-Appellee,
v.
CONSOLIDATION COAL COMPANY,
Defendant-Appellant.

No. 19,623
SOUTH-EAST COAL COMPANY,
Plaintiff-Appellee,
v.
UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Kentucky.

Opinion

Decided and Filed November 18, 1970.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and BROOKS, Circuit Judges.

BROOKS, Circuit Judge. These are appeals by defendants-appellants, United Mine Workers of America (UMW or Union) and Consolidation Coal Company (Consol or Consolidation),[1] from a jury verdict imposing civil liability for alleged violation of Sections 1 and

1. In this action, unlike the situation which existed in *Ramsey v. United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), a coal company which allegedly conspired with the Union to restrain trade was made a codefendant.

2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2). Plaintiff, South-East Coal Company (South-East), contended that a conspiracy to restrain trade existed between UMW, Consol and other large coal companies and the Bituminous Coal Operators Association (BCOA) which was designed to force South-East and other small coal producers in Eastern Kentucky out of the bituminous coal business. After a trial lasting six weeks, the jury returned a verdict for plaintiff, South-East Coal Company, in the amount of $2,410,452. This amount was tripled ($7,231,356) as required by 15 U.S.C. § 15, and attorneys' fees of $335,000 were allowed, bringing the total judgment to $7,566,356. We affirm.

On numerous occasions this Court has considered similar alleged conspiracies between the UMW and large bituminous coal producers and for a general explanation and description of the nature of the contended conspiracy in this case, the following cases are particularly illuminating. *United Mine Workers v. Pennington,* 381 U.S. 657 at 664 (1965); *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192 at 1193 (6th Cir. 1969); *Ramsey v. United Mine Workers,* 265 F. Supp. 388 at 392, 393 (E.D. Tenn. 1967); *Pennington v. United Mine Workers,* 325 F.2d 804 at 807 (6th Cir. 1963).

While recognizing that the present case is factually distinguishable from the cited cases[2] and that differing proof was employed by the plaintiff, South-East, in at-

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2. A notable difference is that, unlike in the cases cited above, there is in the present case no contention made that the alleged conspiracy attempted to affect or manipulate coal prices in the T.W.A. [sic.] bituminous coal market.

tempting to establish the existence of this conspiracy, this opinion would, however, be unduly lengthened by an elaborate discussion of plaintiff's case and proof. Therefore, the specific and unique facts involved in this case which bear on issues raised on this appeal will be considered in conjunction with those issues. Both appellants have taken issue with certain conduct at trial which allegedly prejudiced them jointly, and these issues will be consolidated for consideration. Issues raised by appellants which explore alleged errors having only singular significance will be dealt with individually.

I. ALLEGED ERRORS IN INSTRUCTIONS

A. THE STANDARD OF PROOF REQUIRED TO IMPOSE LIABILITY

Consol and the Union argue that the District Court erred in its charge to the jury on the necessary degree or standard of proof which plaintiff must meet in order for the jury to conclude that appellants violated the Sherman Act. The Union, relying upon *Lewis v. Pennington,* 400 F.2d 806 (6th Cir.. 1968)[3] and *Ramsey v.*

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3. The *Lewis v. Pennington* case has a rather involved history. This Court first affirmed the District Court holding against UMW in *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963). The Supreme Court agreed that the Union's exemption from the antitrust laws did not apply in this situation but reversed on other grounds. *Pennington v. UMW,* 381 U.S. 657 (1965). On retrial in *Lewis v. Pennington,* 257 F.Supp. 815 (1966), the District Court found in favor of the Union reasoning that plaintiff failed to demonstrate by "clear proof" any violation of the antitrust laws. This Court in *Lewis v. Pennington,* 400 F.2d 806 (6th Cir. 1968) affirmed the District Court. (Before Judges Edwards, Peck and Combs, per J. Edwards). Certiorari was denied by the Supreme Court in 393 U. S. 983 (1968).

United Mine Workers, 416 F.2d 655 (6th Cir. 1969),[4] contends that the District Court did not adequately or accurately instruct the jury that to impose liability on

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4. In *Ramsey v. UMW* this Court sat en banc. This was an appeal from the District Court ruling dismissing the action, 265 F.Supp. 388 (1967), because plaintiffs could not show an antitrust violation on the part of the Union by "clear proof", although by the ordinary standard of preponderance of the evidence the Court suggested that liability might be imposed upon the Union. A three-judge panel of this Court heard this appeal on April 8, 1969. Rehearing en banc was granted and that opinion appears at 416 F.2d 655 (6th Cir. 1969), Chief Judge Phillips and Judges Edwards, Peck and Combs for affirming; opinion by Judge Edwards. Judges Weick, O'Sullivan, Celebrezze and McCree for reversing; opinion by Judge O'Sullivan. Certiorari was granted by the Supreme Court, — U.S. — (March .., 1970).

One week before the en banc hearing in *Ramsey,* a panel composed of Judges Weick, Peck and Combs (opinion by Judge Weick) in *Tennessee Consolidated Coal Company v. UMW*, 416 F.2d 1192 (1969) affirmed the jury finding of liability of the union for an antitrust violation. (The West Kentucky Coal Company which was joined as a defendant because it was an alleged co-conspirator of the union was voluntarily non-suited. Thus, here again, we had only the union being sued.) This Court observed regarding the District Court's instructions that the Union was given the benefit of a more stringent standard of proof by the fashion in which the District Court instructed the jury on "clear proof" and, therefore, was not prejudiced by the instructions even if they were incorrect. The Court made the following remark respecting Section 6 of the Norris-LaGuardia Act: "Section 6 does provide that participation, authorization or ratification must be shown by clear proof. Section 6 does not state that the unlawful acts must be shown by clear proof." Judges Peck and Combs were among the judges in the divided court in *Ramsey, supra,* which there held that all elements of the antitrust vio-

the Union every essential element of the violation, except damages, must be established by "clear proof".[5] Consol joins in and maintains that it too should get the benefit of this more stringent standard of proof. This Circuit is somewhat in disagreement as to the proper degree of proof required to hold a labor union liable for violating the Sherman Act. In the en banc hearing in

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lation except damages must be shown by clear proof. Judge Weick, author of the opinion in *Tennessee Consolidated Coal,* joined those judges in *Ramsey* who felt that only the authorization, participation, or ratification by the Union of the unlawful acts need be shown by clear proof. Certiorari in *Tennessee Consolidated Coal* was denied by the Supreme Court, 38 U.S.L.W. 3335, 3342 (March 3, 1970).

5. The District Court gave an instruction on proof by a preponderance of the evidence, see *infra* p. 14. However, in its supplemental instructions to the jury, the Court gave the following charge on "clear proof":

> "Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that additional instruction as a definition for one of the terms I used in my charge."

Thus, the District Court did charge the jury that "clear proof" of participation, authorization or ratification of the alleged conspiracy by the defendants was necessary to hold them liable. While it is concluded that the "clear proof" standard is applicable only in holding a union ratified or authorized the acts of its officials, the District Court's instruction even if erroneous gave both defendants the benefit of a more stringent burden of proof for finding them liable.

Ramsey v. United Mine Workers, supra, the Court divided evenly on the issue. Four judges held that to impose liability on a labor union for a Sherman Act violation Section 6 of the Norris-LaGuardia Act[6] requires that every element of the unlawful act except damages be shown by "clear proof". Four judges construed this section of the Norris-LaGuardia Act to provide that the "clear proof" standard applied only in proving that the Union participated in, authorized or ratified the unlawful acts of its officers with actual knowledge. They concluded that after this was shown by "clear proof" the remaining elements of the antitrust violation—formation of the antitrust conspiracy, the unlawful acts, causation and damages, and all the other elements — required proof only by a preponderance of the evidence.

Because a major coal company has been named a defendant as a coconspirator with the UMW in this antitrust case, a unique problem is presented with respect to the standard of proof question. That problem is what standard of proof must be met by the plaintiff to hold a company liable for an antitrust violation if it conspired with a labor union. If it is assumed that

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6. Section 6 of the Act (29 U.S.C. § 106) provides:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

the correct standard of proof to be applied in holding a labor union civilly liable for a Sherman Act violation is "clear proof" of all essential elements, the question then is: "Should a company which is fortuitously joined as a coconspirator of a labor union in an antitrust case get the benefit of the stricter standard of proof afforded the union?" There is no basis in either the Sherman Act or the Norris-LaGuardia Act to indicate that to impose liability on a company, named as a coconspirator of a labor union for an antitrust violation, anything more than a preponderance of the evidence is necessary. To hold that a company should get the benefit of this more strict standard, simply because it was named with a labor union as a coconspirator in a scheme to restrain trade, would be to grant such a company a more advantageous position than other companies would have, which might violate the antitrust laws but are not joined with a union. The law does not provide such an arbitrary advantage. The standard of proof applicable to a company in attempting to show it violated the antitrust laws, regardless of whether it is joined as a coconspirator with a labor union, is the preponderance of the evidence. *Bigelow v. RKO Pictures,* 150 F.2d 877, 883 (7th Cir. 1945); reversed on other grounds, 327 U.S. 251 (1946).

Having concluded that the standard of proof needed to be met to hold a company civilly for an antitrust violation is preponderance of the evidence, another legal hurdle is encountered when, as in this case, a company is joined as a coconspirator with a union. Again, assume that the correct standard of proof applicable to a labor union under these circum-

stances is "clear proof". Hypothetically, a situation could exist where only a union and a single company have conspired to restrain trade. Suppose that in this hypothetical case it could be shown by a preponderance of the evidence that the company did conspire to violate the antitrust laws, however, while a preponderance of the evidence also showed the union conspired, it could not be shown by "clear proof". Therefore, the union would be exonerated and, by force of the fact that a Sherman Act violation is an actionable wrong only when committed under an unlawful conspiracy by two or more, the company would also escape liability. *United States v. Socony-Vacuum Oil Company,* 310 U.S. 150 (1940); *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), cert. denied, 356 U.S. 975. Thus, the company by indirect method would have received the benefit of the more strict standard of proof. While the chances of a situation as this occurring are perhaps remote, this explains the type of problem which may result when parties to an actionable wrong like conspiracy have their respective ultimate liabilities gauged by different standards of proof.

This leads to the question of whether all essential elements of an alleged antitrust conspiracy against a labor union must be shown by "clear proof". The en banc decision of this Court in *Ramsey* did not resolve this controversy. Without a repetitive discussion of the rationale behind this panel's conclusion on this issue, already extensively explored in Judge O'Sullivan's opinion in *Ramsey,* it is concluded that while "clear proof" is necessary to show that the Union participated, authorized, or ratified the acts of its officers, the

essential elements of the conspiracy necessary to resolve the ultimate issue of liability need be shown only by a preponderance of the evidence. (See n. 4). The jury charge on the standard of proof issue could have been more clear, however, the parties were given the benefit of a partial instruction which was more stringent than required by this Court's conclusion on what is the proper standard of proof.[7] Thus, the parties were not prejudiced by the instruction even if it was erroneous.

B. THE REASONABLENESS OF THE RESTRAINT

UMW and Consol claim they were prejudiced by the absence of an instruction to the jury that only undue or unreasonable restraints of trade or competition are grounds for finding a Sherman Act violation. Usually, to find that a violation of the Sherman Act has occurred, the restraint of trade or competition resulting from certain acts committed by the accused parties must be "unreasonable". See generally, *Standard Oil Company v. United States,* 221 U.S. 1 (1911); *Apex Hosiery Company v. Leader,* 310 U.S. 469 (1940); *Lewis v. Pennington, supra.* However, there are several types of restraints of trade which are per se unreasable. See e.g., *United States v. Trenton Potteries Company,* 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Company, Inc., supra; United States v. Consolidated Laundries Corporation,* 291 F.2d 563 (2nd Cir. 1961). Other restraints, while reasonable on their face, become unreasonable when they are accompanied with a specific intent to accomplish a forbidden

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7. See n. 5, supra.

restraint. *United States v. Columbia Steel Company,* 334 U.S. 492 (1948).

In *United Mine Workers v. Pennington, supra,* an alleged conspiracy existed which had as part of its purpose the identical objective that plaintiff, South-East, contends was the object of this particular conspiracy. That is, that the "union entered into a conspiracy with the large operators to impose the agreed-upon wages and royalty scales upon the smaller, non-union operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and preempting the market for the large unionized operators." Respecting this type of conspiracy the Supreme Court observed at 381 U.S. 665, 666:

> "[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior (Footnote omitted). But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

The Supreme Court then made the following analogy:

> "One could hardly contend, for example, that one group of employers could lawfully demand that the

union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry." 381 U.S. at 668.

The conclusion which can be drawn from this language is that when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws. [But see the interpretation given this language by Judge Peck in *Lewis v. Pennington,* 400 F.2d 806, 813-814 (1968) and by District Judge Wilson in *Ramsey v. United Mine Workers,* 265 F.Supp. 388, 399 (1967)]. Thus, if it could be shown that in this case the Union entered into a conspiracy with certain large coal operators to impose agreed upon wages and royalties upon smaller, nonunion coal producers, regardless of their ability to pay and regardless of whether or not the Union represented the employees of these smaller companies, all for the avowed purpose of eliminating them from the business, limiting production and pre-empting the market for the larger, unionized coal producers, this conspiracy would be a per se unreasonable restraint of trade or competition. While the District Court did not give an instruc-

tion that only undue or unreasonable restraints of trade or competition can be grounds for a jury to conclude that there was an antitrust violation, in light of the conclusion that if the alleged conspiracy in this case was proved, it would be by definition unreasonable, no specific instruction on the reasonableness of the restraint was necessary.

C. INSTRUCTIONS ON A LABOR UNION'S EXEMPTION FROM THE ANTITRUST LAWS

The United Mine Workers argue that they were prejudiced by the District Court's failure to give its proffered instruction on a labor union's exemption from the antitrust laws.[8] The District Court gave the following instructions respecting activities of a labor union and their relationship to the antitrust laws:

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8 The Union proffered the following instruction:

"3. In Section 6 of the Clayton Act, which amended the Sherman Antitrust Act, Congress declared that 'the labor of a human being is not a commodity or article of commerce nor shall (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.' The entering into a wage agreement with employers, which is a successful union activity, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. However, a labor union to be effective must eliminate the competition from goods produced under sub-standard labor conditions. The elimination of price competition based on differences in labor standards is a lawful union objective and the effect of such objective on price competition is not violative of the antitrust laws. *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 503; *UMWA v. Pennington,* 381 U.S. 657, 664."

"Now, the law does not make it unlawful for them to combine for the purpose of making a union for the purpose of protecting their rights and for having a bargaining agent, so you are not to consider because the union is composed of a great many miners, all of the miners in this Eastern Kentucky who are members of it, that of itself is not unlawful. The courts have expressly said so.

"The law has expressly said so in what is known as the LaGuardia Act that was passed by the Congress. That is not unlawful."

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"Then under the national law and under the national policy, the labor laws, as we have produced under what is known as the Labor Act, and the LaGuardia Act and these other Acts of Congress, they were allowed to bargain collectively. They didn't hire one man for so much and another for so much, but the miners and other workers in other industries were allowed to bargain collectively and to select a bargaining agent."

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"A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union's interest, seek to obtain the same terms from other employers; but a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit."[9]

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9. The correct statement per *Pennington* is "a certain wage scale on other bargaining units." Apparently,

"One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it becomes a party to the conspiracy.

"This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment for the remaining employees and employer in the industry.

"It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on difference in such standards.

"This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.

"The union has a duty to bargain unit by unit in order to best serve its obligations to its members.

"The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being straightjacketed by some prior agreement with favored employers."

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this was a misspoken phrase, as the District Judge in the remainder of the charge more than adequately conveys the idea that the disallowed conduct is when an employer (or a multi-employer bargaining unit) combines with a labor unit to impose certain labor standards or conditions on other bargaining units or employers.

These instructions, portions of which are taken from *UMW v. Pennington,* 381 U.S. 657 (1965), adequately explained to the jury what types of conduct a labor union may engage in without fear of antitrust violation repercussion. The instructions also advised the jury under what circumstances otherwise lawful union activity would result in an antitrust violation. See generally, *Allen Bradley Company v. Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *United States v. Hutcheson,* 312 U.S. 219 (1941); *Ramsey v. United Mine Workers, supra.* The Union complains that the expression "exemption" was only used once in the instruction. It is interesting to observe that even in UMW's proffered instruction on this subject (see n. 8) the expression "exemption" was not used. While a party has the right to have his legal claims of defenses stated to the jury by way of instructions, so long as the District Judge accurately states these claims or defenses, there can be no grounds for objection simply because the exact wording or phrasing of the requesting party are not used.

The Union contends that the instructions in this case were as fatal as those given in *Cedar Crest Hats, Inc. v. United Hatters, Cap and Millinery Workers International Union,* 362 F.2d 322 (5th Cir. 1966). That suit involved a labor union against whom charges of antitrust violations and unfair labor practices were made. On appeal the union objected to the court's instructions which did not even mention that certain conduct engaged in by a labor union does not fall within the scope of activities violating the antitrust laws. A comparison of the trial court's instruction in that case (appearing at 362 F.2d 322, 325-326) with the instructions given in

the instant case, *supra,* respecting a labor union's conduct in regard to the antitrust laws clearly indicates that the instructions in question on this appeal were both correct and fair.

D. EQUAL HYPOTHESIS RULE

Appellants contend it was error for the District Court not to instruct the jury that "where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." *Pennsylvania Railroad Company v. Chamberlain,* 288 U.S. 333, 339 (1933). It is argued that such an instruction is a necessary component of the law applicable to circumstantial evidence and was properly given in *Ramsey v. United Mine Workers,* 265 F.Supp. 388 at 432 (1967), and *Tennessee Consolidated Coal Company v. United Mine Workers* (unreported District Court opinion) and respectively affirmed by this Court in *Ramsey v. United Mine Workers,* 416 F.2d 655, 665 (6th Cir. 1969), and *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192, 1202-1203 (6th Cir. 1969).

It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contra-proposition, the plaintiff has not met his burden of proof. When there are equal inferences which can

be drawn from a particular set of facts — one inference indicating liability, the other non-liability — it is the judge's obligation at the direct verdict stage of the trial to find for the defendant. See *Pennsylvania Railroad Company v. Chamberlain, supra; Gulf Refining Company v. Mark C. Walker & Son Company,* 124 F.2d 420, 426 (6th Cir. 1942). It would not be proper under these circumstances for the trial judge to relinquish to the jury this responsibility by simply giving them an instruction to the effect that if they could not draw either an inference of liability or one of non-liability from the facts presented, they should conclude non-liability.[10]

In this case the District Court instructed the jury on the meaning of plaintiff having to sustain the burden of proof by a preponderance of the evidence. He stated:

> "Now, in order to recover, the South-East Coal Company must sustain the burden of proof; in other words, if no proof was offered, there would be no

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10. The *Ramsey* case relied upon by appellants was a non-jury case. On appeal an observation — not an instruction — made by the District Judge in his opinion was quoted with approval. Since the "equal inference" rule or doctrine is used by the trial judge in deciding the question of whether a directed verdict should be granted a defendant because plaintiff has not satisfied his burden of proof, it is both logical and correct that this rule entered the trial judge's thinking in the non-jury trial in *Ramsey*. It is doubtful that the equal inference instruction given in *Tennessee Consolidated* to the jury was correct. However, this apparently was not assigned as error on appeal as no mention whatsoever is made of that instruction or the propriety of its use in the appellate opinion in the case. See *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192 (6th Cir. 1969).

judgment for the plaintiff. It is his responsibility to offer proof to establish the facts that he claims.

"And the defendant has the right, as you have seen here, to offer proof to contradict those facts or to explain those facts or to justify its conduct, which may have been brought out by witnesses for the plaintiff in support of its allegations.

"But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by 'burden of proof,' it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of 'burden of proof' with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.

"But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

"Should it fail in its proof, under this rule you should find for the defendant.

"To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the 'preponderance of the evidence' means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true."

These instructions explained what South-East had to prove and to what degree the jury must be convinced of the truth of South-East's assertions. It was not error for the District Court to refuse to give the "equal hypothesis" instruction requested by appellants.

E. INSTRUCTIONS RESPECTING THE USE TO BE MADE BY THE JURY OF CERTAIN HEARSAY STATEMENTS

Consolidation raises as error the District Court's refusal to give a concluding instruction to the jury regarding the permissive use of certain statements which were competent evidence as against the Union but were hearsay as applied to Consolidation. The rejected instruction stated in part that:

> "During the trial the Court has permitted the introduction of evidence concerning the actions and statements of each of the defendants with specific admonition to the jury, however, that the members of the jury must not consider that evidence against the other defendants . . . . Inasmuch as there can be no liability on the part of the defendants unless a conspiracy is (proven) . . . you must disregard all of such evidence unless you first find by other and disassociated evidence in the case sufficient . . . proof that the conspiracy claimed by plaintiff existed. In such event you may then consider the evidence subject to the admonition in concert with all the other evidence in the case."

A requested instruction similar to this was not given in *Schmeller v. United States,* 143 F.2d 544, 550 (6th Cir. 1944), and it was held reversible error. This case lends the strongest support for Consolidation's

position. However, since the *Schmeller* case was decided, the logic and correctness of a jury charge that instructs that certain hearsay statements as to one defendant cannot be used by the jury in determining whether a conspiracy exists between defendants until the jury has first concluded that the defendants are guilty of an unlawful conspiracy, has apparently been seriously challenged. In addition, appellants' reliance on *Schmeller* is not entirely appropriate as part of the reason the Court found error in the refusal to give the instruction was that there were both substantive charges and a conspiracy charge involved. In the instant case we are dealing only with a conspiracy charge. In *Carbo v. United States,* 314 F.2d 718, 736 (9th Cir. 1963), an instruction almost identical to that offered by Consolidation in this case was held to have been properly rejected as not a correct statement of the law. The Court in *Carbo* observed:

> "The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits. (Footnote omitted). The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators, they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law [which, except for the standard of proof is identical to that asserted by Consolidation] . . . is

that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.

"Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declaration at all. The district court in effect will have told the jury, 'You may not consider this evidence unless you first find the defendant guilty.' "

[Bracketed explanation is this Court's].

While *Carbo* and many of the cases which have dealt with this problem are criminal in nature, therefore requiring the jury to conclude the existence of a conspiracy beyond a reasonable doubt, the paradox of instructing a jury that certain statements can be used to establish a conspiracy only after they have already found the conspiracy to exist is just as illogical in civil cases, although a lesser standard of proof is required. Thus, it is concluded that the preliminary question of the admissibility of evidence challenged under this technical evidentiary rule (this is clearly a question of admissibility and not of sufficiency or weight of the evidence, *Wong Sun v. United States,* 371 U.S. 471 (1962)) is a matter for the judge not the jury to decide and, therefore, the instruction was properly rejected by the District Court. We deal here only with the propriety, as a legal matter, of the District Court's refusal to give Consolidation's proposed instruction, and the question of whether the Court erred in admitting these statements because no prima facie case was established will be considered later, *infra.,* see pp. 33-34.

F. INSTRUCTIONS RESPECTING THE PROTECTIVE WAGE CLAUSE AND "80-CENT CLAUSE" IN THE NATIONAL AGREEMENT

Alleged errors in the District Court's instruction regarding the Protective Wage Clause (PWC)[11] and the "80-cent clause"[12] presents a legal problem the reso-

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11. See *Ramsey v. United Mine Workers,* 416 F.2d 655 and *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192 for a discussion of the PWC and the complete text of the clause.

12. The "80-cent clause" of the National Agreement provided:

"UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIRMENT FUND OF 1950
(As Amended)

"Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word 'During' and ending after the word 'sale' and inserting in lieu thereof the following: 'During the life of this agreement there shall be paid into such Fund by each operator signatory hereto the sum of forty cents (40 cents) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by use or for sale. On all bituminous coal procured or any subsidiary or affiliate of such Operator signatory hereto the sum of (80 cents) [sic.] per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40 cents) per ton had not been paid into said Fund prior to such procurement or acquisition. The parties hereto mu-

lution of which may be helped by a brief discussion of the clauses and the role they played in the various national labor agreements in which they appeared. The National Bituminous Coal Wage Agreement entered into between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers in 1950 was amended in 1958 thereby incorporating the Protective Wage Clause. The arrangement provided by the clause was that the United Mine Workers agreed, as bargaining agent for the employees covered by the contract (members of the UMW), that while the contract was in effect it would not enter into, or be a party to any agreement covering wages or working conditions which were not on an equal basis with those provisions contained in this contract. In return for this commitment, the coal producing signatories to the NationalAgreement (BCOA members) agreed "that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under

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tually agree that, if at any time during the term of this agreement a court or tribunal of competent jurisdiction determines by final decision that the provision appearing in the sentence just preceding, providing for the payment by signatory operators of eighty cents (80 cents) per ton under certain prescribed conditions, is invalid or in violation of the National Labor Relations Act, as amended, or other federal or state law, the parties shall, at the option of and upon demand by party of the second part, without affecting the integrity of any other provision of this section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this agreement in replacement of the provisions found invalid or unlawful."

a sub-contract arrangement shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

The "80-cent clause" of 1964 amended the Welfare and Retirement Fund provisions of the 1950 National Agreement. The Protective Wage Clause was dropped from the Agreement in that year. Until this amendment went into effect signatories to the National Agreement had to pay into the Welfare Fund forty cents per ton of coal they produced. The purpose of the amendment was to obligate signatories who procured or acquired bituminous coal for sale or use which was not produced under an agreement requiring the paying of forty cents per ton into the Welfare Fund (non-UMW produced coal) to pay eighty cents into the Welfare Fund for each ton of coal so procured. While the stated purpose of the amendment was to protect work standards by equalizing labor costs between employees of signatories and non-signatories, the obvious effect was to discourage signatories from purchasing or acting as sale agents for coal companies which produced coal with non-UMW laborers.

The legality of the Protective Wage Clause, in terms of the antitrust laws, was considered in the *Ramsey* and *Tennessee Consolidated Coal* cases. In *Ramsey,* responding to the allegation that the PWC was a per se violation of the Sherman Act, the Court (all judges concurred in this portion of the opinion) observed that the clause was capable of two opposite constructions. However, the proper interpretation to be given the clause was the one "that does not result in a violation of the law." *Ramsey* at 659. In *Tennessee Consolidated Coal* the jury's general verdict imposing liability on the Un-

ion concluded that the PWC required the Union not to bargain with non-signatory operators except upon the terms and conditions of the National Agreement, 416 F.2d 1192, 1197 (6th Cir. 1969). The jury also found in response to special interrogatories that "prior to and apart from" the National Agreement as amended in 1958 the UMW did not conspire with signatory coal operators to impose the terms of the National Agreement on non-signatories. It should be noted that except for several minor alterations in the 1950 National Agreement made by the 1958 amendment, the addition of the Protective Wage Clause by the amendment constituted the major change in the National Agreement. On appeal on *Tennessee Coal,* this Court stated that the contract, the PWC, was ambiguous and that all circumstances surrounding the contract and the practical construction given it by the parties could be used by the jury in determining the meaning of the contract. While it cannot be said with absolute certainty upon which theory or basis the jury chose to impose liability in the *Tennessee* Coal case, it seems that the jury felt that the PWC was the crux of the Union's illegal conduct.[13]

The legality of the "80-cent clause" in terms of the antitrust laws has not been considered by an appellate court. When the "80-cent clause" was incorporated into the National Agreement, charges that it violated Section 8(e) of the National Labor Relations Act were raised. See *Lewis v. National Labor Relations Board,*

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13. The *Tennessee Coal case* was decided a week after the *Ramsey* case. However, it is not clear what effect *Ramsey* has on the findings of the jury in *Tennessee Coal.* Certiorari was denied in *Tennessee Coal* but granted in *Ramsey.*

350 F.2d 801 (D.C.Cir. 1965); *United Mine Workers v. National Labor Relations Board,* 399 F.2d 977 (D.C.Cir. 1968). A final determination of this question has not been made.

Appellants maintain that the instruction with respect to these clauses failed to "adequately or accurately" explain the significance of these provisions and the proper legal interpretation that should be given them. Specifically, they contend that the District Court's instructions were in contradiction in so far as they instructed the jury that the contracts or national agreements containing these clauses were legal, but that they, the jury, could conclude that an antitrust violation occurred if they found that the agreements were entered into with the intention of driving certain coal producers out of business. It is argued that this is paradoxical and that either the agreements were legal or illegal. South-East contends that the instructions were accurate and more than adequate because they admitted the legality of the clauses in the national agreements, but based their claim of antitrust violation on the theory of the existence of an "intentional predatory conspiracy" as developed by Mr. Justice White's opinion in *Pennington.* Neither of these positions is a wholly correct interpretation of the law as stated in *Pennington.*

In *Ramsey* the Supreme Court's decision in *Pennington* was examined with particular attention or agreement between an employer and a labor union might produce grounds for concluding that an antitrust violation occurred. It was in *Ramsey* that it was decided that "the language of the agrement (PWC) did not per se constitute an illegal conspiracy." In addition, *Penning-*

ton was construed to have held that "a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act" and that " 'predatory intent' (as used by Mr. Justice White, 381 U.S. at 668 . . .) is merely shorthand employed to describe this anti-competitive conspiracy."

Reviewing the *Ramsey* decision's interpretation of *Pennington* four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause, is on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interest, ther [sic.] are no grounds for concluding a violation of the antitrust laws. Third, if however the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision.

The District Court gave the following instruction with regard to the National Agreement, the nature of

an illegal conspiracy and what South-East was required to show before the jury could impose liability on the defendants:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff.
>
> * * * * * * *
>
> "The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself; but if it was entered into with the intention on the part of the signatories — the two defendants here — to injure the plaintiff, if they had that in mind, that 'we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting

competitors out of busines or seriously hampering his operation.'

"So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?

* * * * * * *

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability, of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of businesss, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants."

It was not necessary for the District Court to go into more detail about the significance of the PWC or the "80-cent cluase."[14] The charge properly instructed

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14. During closing arguments counsel for UMW objected to certain statements made by counsel for South-East about the National Agreement. The District Court at that time gave further instructions to the jury about the PWC. The colloquy was as follows:

the jury on the relationship between the National Agreement and the antitrust laws and what must be shown in this regard to impose liability.[15]

The Court: "As I understand counsel's argument, he is drawing a deduction from these circumstances. He does not argue, and the jury is instructed, if it has been given that impression, that it is not proper.

"There is nothing wrong per se, that is, of itself, with the execution of this contract. I should instruct them on that as a general instruction.

"In other words, you are not to consider that simply because there was an agreement between BCOA and the UMW that that of itself established a violation of the antitrust laws.

"I got the impression that he was using those figures to establish his claim that the results proved the basis on which he relied."

South-East's Counsel: "The circumstances at the time of making these contracts, they have got to be used to prove an antitrust claim."

Appellants' Counsel: "I submit to the Court that the same words that were used at the bench as being objectionable were used by this counsel to the same effect, that this jury would have to consider the consequences of this type of bargaining, eliminating from the whole industry certain people and causing a good deal of harm."

The Court: "The jury is instructed that the execution of the contract itself is not per se a violation of law."

Appellants' Counsel: "Okay."

15. Appellants also claim error in the instruction because of remarks made by the District Judge which were incorrect statements of certain dates involving passage of the PWC and "80-cent clause." In the suplemental [sic.] instructions the District Judge corrected himself and no prejudice resulted from the error.

G. THE DEFENSE OF IN PARI DELICTO ASSUMPTION OF RISK OF THE CONSPIRACY, WAIVER OF RIGHTS ARISING FROM THE CONSPIRACY AND ESTOPPEL.

Appellant Consolidation Coal claims error in the District Court's instruction on its various defenses. Particular emphasis is assigned to the alleged error in the District Court's instruction on the defense of *in pari delicto*. With reference to this defense, the District Court charged the jury that:

> "Now, the defendants here say that, admitting all of these things for the sake of argument, as we put it, whatever damage came to the plaintiff, that he was a part of it.
>
> "He can't claim anything against the coal operators because this arrangement which they had with the UMWA had his approval and endorsement, that he was a member of the BCOA — Bituminous Coal Operators Association — that drew up the contract, and that he was a sponsor of it and, therefore, if he got hurt by it, if it was wrong, he was helping in a wrong, "impari delicto' (sic) they call it. That is equal guilt.
>
> "A person who is of equal guilt cannot claim that he has been wronged by other people who assisted or collaborated with him on the same project.
>
> "The defendants have entered the defense of 'in pari delicto' — this means that the defendants say that if an unlawful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy.

"Under this defense, the Court charges you that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages for that period of time that the plaintiff remained a party to the conspiracy.

"Now, a person may be a party to such an arrangement, be 'in pari delicto,' but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

"So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of putting other operators out of business, yet, if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy.

"Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal."

This charge more than adequately instructed the jury with respect to the defense of *in pari delicto,* and the effect South-East's participation in the conspiracy would have on the amount of damages recoverable if termination of its part in the conspiracy did not occur. The only difficulty with the instruction is that perhaps

it should not have been given at all. Recent cases have tended to indicate that for reasons of public policy the defense of *in pari delicto* is not available to a defendant in certain types of antitrust cases. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757 (6th Cir. 1967); *Sahm v. V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968). However, since it has been concluded that the instructions given on this defense were correct, it is not necessary to reach the question of whether the type of antitrust conspiracy involved in this case falls into the category of those antitrust conspiracies in which the defense of *in pari delicto* is available.

Consolidation's request for instructions on its defenses of assumption of risk of the conspiracy, waiver of rights arising from the conspiracy and estoppel were properly rejected by the District Court. While these defenses might be proper in certain negligence and contract cases, there is no evidence that Congress intended that these defenses could be set up by analogy as a defense in an antitrust case. Furthermore, even if these defenses were available, it appears that they would be subsumed in the more inclusive defense of *in pari delicto.*

H. INSTRUCTIONS DEALING WITH THE ISSUE OF BAD BUSINESS JUDGMENT.

Consolidation also claims that the District Judge negated one of its primary contentions with certain remarks made in the instructions. The primary contention allegedly negated by the District Judge's statements was that much of the injury South-East sought

recovery for did not result from the antitrust conspiracy but rather was caused by a "serious mistake in judgment in building a cleaning plant costing $5 million and at a point some one hundred twenty-five miles from the mine . . ." The remarks made by the District Judge concerned only in a very general fashion the importance of a cleaning apparatus in processing bituminous coal and the expensiveness of such a device [sic.] There was copious testimony at trial on both sides of the issue of whether the building of the cleaning plant by South-East was or was not a mistake in business judgment. The alleged prejudicial statements on this matter were made at the very beginning of the charge during a general discussion of the bituminous coal industry when the meaning of certain jargonistic words and phrases used in the coal industry and at the trial were explained to the jury. Towards the end of the instructions, the judge charged the jury on appellant's bad business judgment theory of the cause of South-East's injuries. He stated:

> "The defendants take the position that the (conspiracy did not cause plaintiff's injuries) ... (but the injuries were) the result of either mismanagement, over expansion, economic conditions, or a combination of these, with possibly other circumstances, to none of which either of these defendants had any part.
>
> "That is the theory of the defendants here, that by building this cleaning plant at Irvine, that there was a significant miscalculation of its cost of construction, more than a million dollars it anticipated to cost; that it was 125 miles in haul

from the mines to that plant, which was an additional expense and contrary to good coal production management, and that by loss of the sale of coal through no fault of Consolidation Coal Company, but through the failure of the plaintiff to exercise orthodox business acumen; that that is what caused this plaintiff to lose money, and that through its own failures and no reason to accuse either of these defendants to have committed wrongful acts; the financial problems of the plaintiff arose from its own actions and its own failure to exercise good business judgment in the face of advice on the part of Consolidation Coal Company, according to Mr. Tucker, I believe, who was the witness — is that his name?

Appellants' Counsel: "Cassidy."

The Court: "The last witness who testified. Well, anyway, one of the witnesses for the defendant [said] that he was concerned about the building of this tipple and this cleaning plant, and advised the plaintiff, through its president, Mr. LaViers, and possibly others, that importation from Canada and other places and the use of gas and oil was going to reduce the coal demands thirty-three and a third per cent from locality, or more. Notwithstanding that, this plaintiff proceeded to its development and expansion, and that these defendants were in no way responsible for it. But, due to these circumstances alone, if he had any loss, it was caused by that."

If there was a negation of one of appellant's theories by the passing remarks made by the District

Judge at the beginning of the charge to the jury, it obviously was more than compensated for by the explanation of appellant's position just quoted. It is concluded that appellants were not prejudiced by certain complained of statements made by the District Judge in his instructions to the jury.

II. ALLEGED ERRORS IN EVIDENTIARY MATTERS

A. Evidence of Effects and Consequences of the Alleged Antitrust Conspiracy

The appellants challenge the District Court's ruling on certain evidence offered by South-East which concerned economic conditions in the coal industry in Eastern Kentucky. The evidence was principally statistical and related to such things as: the reduction in the number of miners employed in the coal industry, diminution of population in certain coal producing areas, wage scales in the bituminous coal industry, quantitive fluctuations in coal production in various years, income and losses of certain bituminous coal producing companies. The objection raised to this type of evidence was that it inordinately emphasized alleged "effects and consequences" of the antitrust conspiracy, thereby misleading the jury to believe that the existence of an anti-competitive conspiracy or agreement could be inferred from these conditions. It is argued that this Court's decisions in *Lewis v. Pennington*, 400 F.2d 806 (6th Cir. 1968), and *Ramsey v. United Mine Workers,* 416 F.2d 655 (6th Cir. 1969), and the Supreme Court's decision in *Pennington v. United Mine Workers,* 381 U.S. 657 (1965), specifically rejected the theory that an antitrust conspiracy can be proven by effects and consequences. The argument is not clear, but it appears that objection is

not made to the admissibility of this type of evidence, rather that this type of evidence standing alone cannot, as a matter of law, serve as the basis for concluding that an antitrust conspiracy exists.

In *Pennington v. United Mine Workers* the Supreme Court stated that a labor union, having concluded a wage agreement with one set of employers, may unilaterally seek to impose the same terms on other employers even though it is believed that "[s]ome employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *Pennington v. United Mine Workers,* at 655, n.2. It was also observed that "[s]uch union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." *Pennington v. United Mine Workers, Id.* The textual material, not the language of the footnote quoted above, appears in *Lewis v. Pennington* and *Ramsey v. United Mine Workers.* Appellants' argument apparently relies upon the language quoted above from the Supreme Court's *Pennington* decision. They construe this language to mean that evidence of the effects and consequences of an alleged conspiracy, *e.g.* statistics showing marginal producers are losing money and going out of business, reduction in the number of individuals employed as coal miners, et cetera, are insufficient to prove an antitrust conspiracy.

It cannot be said definitely that appellant's interpretation of the language in *Pennington* is either right or wrong. While this Court finds it difficult to construe that particular language in *Pennington* as appellants have, some support for appellants' interpretation of

that language can be found in Mr. Justice Goldberg's dissenting opinion in *Pennington* appearing in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Company, Inc.*, 381 U.S. 676 (1965) at 714-715. Even though the language in *Pennington* is not decisive, there is a logical basis for appellants' position. The "effects and consequences" theory is basically a casual argument. That is, a cause (the antitrust conspiracy has produced certain results or effects (reduction in the number of people employed in the mines, financial losses by marginal producers, et cetera.). This type of argument has one chief flaw: The difficulty in isolating a single factor causally responsible for identifiable effects. Often there are intervening and superseding causes which if shown destroy the validity of the argument. The "effects and consequences" theory appellants question appears to simply reverse the usually logical progression from cause to effect by first pointing to certain conditions and then concluding what caused these conditions. In any event, the problem of isolating a particular cause which definitely produced certain effects is still present. The law cannot be that an antitrust conspiracy can be proven by alleged effects and consequences of the conspiracy alone. If the only evidence a plaintiff could produce of an alleged antitrust conspiracy is statistics showing that they and other producers in an industry are losing money while some producers make money; that overall production in the industry is down while profits of certain companies are up; and that employment has dropped off in the industry, the defendants should have a verdict directed for them at the close of plaintiff's case. Plaintiff would not even have made out a prima facie case for recovery.

Regardless of how accurate these statements might be, they do not apply under the facts of this case. Reviewing the record, it becomes obvious that contrary to appellants' contention South-East's case does not rest solely on alleged effects and consequences to prove the existence of the antitrust conspiracy. South-East presented evidence of statements made by UMW and Consolidation officials tending to show that there existed an implied or expressed agreement between the Union and Consolidation, there was evidence of past courses of dealing and performance between itself and Consolidation which were interrupted or changed as a result of Union activity; there was evidence concerning what happened at bargaining sessions between South-East and the Union which indicated that some agreement other than the National Agreement (the Bituminous Coal Wage Agreement) existed between the Union and certain producers.

While the question of the sufficiency of this evidence will be dealt with later, the importance of indicating that South-East introduced other evidence from which the existence of an agreement to restrain trade or competition could be inferred, is to show that it did not rely solely on alleged effects and consequences of the antitrust conspiracy to prove its claim. If the only evidence South-East introduced was the statistical evidence referred to earlier, then the case should never have been submitted to the jury. However, this was not the only proof they offered. Evidence of the type which appellants object to is admissible and can be considered by the jury in drawing its conclusion on the issue of liability if there is other evidence which supports the claim. See generally, *Local 175 of the International*

Brotherhood of Electrical Workers v. United States, 219 F.2d 431 (6th Cir. 1955); *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975. Therefore, while appellants' argument might be correct as far as it goes, it does not apply to the facts of this case.

B. EVIDENCE AND STATEMENTS WHICH ALLEGEDLY PERSONALIZED SOUTH-EAST CLAIMS THEREBY PREJUDICING APPELLANT

Consolidation maintains they were prejudiced because certain evidence admitted and statements made at the trial tended to personalize South-East's claim that is, gave the impression that it was the claim of the LaViers' family which controls and operates the company. It is contended that this left the jury with the idea that this was a David versus Goliath type controversy, with the LaViers family representing the small South-East Coal Company battling the combined giant forces of Consolidation Coal Company and the United Mine Workers of America. Thus, appellants argue that because of this characterization, the jury's sympathies had to be with the underdog South-East Coal.

South-East Coal Company, for all intents and purposes, is a family-owned and family-run coal company. Mr. Harry LaViers, Senior, and his son, Harry LaViers, Junior, were the controlling forces behind South-East and made the decisions, either good or bad, for the company. The company, compared to Consolidation, is a small producer of coal and its actions are earmarked with the LaViers' name. While there was some personalization of the company's claim by occasional interchanging of the name plaintiff with Harry LaViers,

Senior or Junior, this was no more excessive than might be expected under the circumstances. In addition appellants, partially as a result of the defense of *in pari delicto,* tended to contribute to any personalization which may have taken place.

Conceding that some personalization of South-East's claim did occur, it is still difficult to accept appellant's argument that this converted the dispute into a small company versus large company controversy, or appellant's assumption that a jury's sympathies always rest with the underdog. Without some additional evidence that appellants were in fact prejudiced by these characterizations, the record does not support these assertions, and it is concluded that no injury resulted.

C. ADMISSIBILITY OF CERTAIN HEARSAY STATEMENTS

During the trial, South-East introduced into evidence portions of answers made by the United Mine Workers to written interrogatories. The Union was asked to admit to the authenticity of certain speeches, editorials and statements made by Union officials which were appended to the Union's answers to the interrogatories, and then parts of these documents were read to the jury. Consolidation objected to and now challenges the admissibility of these statements on the grounds that they were hearsay as against them. (Consol's objection to the District Court's refusal to give its requested instruction on this matter was discussed earlier. See, I. ALLEGED ERRORS IN INSTRUCTIONS: Section *E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements,* supra, at p. 15). Consol's principal contention is that statements of this type are not to be admitted until "[t]here is inde-

pendent evidence establishing, prima facie, that such others were members of the conspiracy." *Standard Oil Company v. Moore, supra.*

The general rule is that this type of evidence is admissible, however, subject to exclusion if no prima facie case of the existence of the conspiracy is established. The question of conditional admissibility is for the trial judge to determine. *Carbo v. United States,* 314 F.2d 718 (9th Cir. 1963). There is no error in conditionally admitting the statements before a prima facie case was established by independent evidence if subsequently such a case is proven, because the trial judge has wide discretion over the order of proof. *Pennington v. United Mine Workers,* 325 F.2d 804, 817 (6th Cir. 1963), reversed on other grounds, 381 U.S. 657 (1965). *Flintkote Company v. Lysfjord,* 246 F.2d 368, 378 (9th Cir. 1957), cert. denied, 355 U.S. 835. At the close of plaintiff's case there had been established by independent or disassociated evidence a prima facie case, thus the requirement for having conditionally admitted the statements was met.

D. SUFFICIENCY OF THE EVIDENCE

Appellants contend that the jury verdict, and the District Court's denial of their motions for directed verdict and judgment notwithstanding the verdict are in error, as the verdict "is not supported by clear evidence, but is contrary to undisputed facts and applicable legal principles." Appellants' argument with regard to the "clear proof" standard has already been discussed. See, I. ALLEGED ERRORS IN INSTRUCTIONS, Section A. *The Standard of Proof Required to Impose Liability, supra,* at pp. 3-7. Furthermore, appellants' arguments

on applicable legal principles have also been dealt with, See I. ALLEGED ERRORS IN INSTRUCTIONS, pp. 3-28, and what remains is the issue of sufficiency of the evidence.

In considering the sufficiency of the evidence, little if any advantage would be gained by an itemized review of plaintiff's case. Much of the evidence introduced at trial was similar to that used at the trials in *Tennessee Consolidated Coal v. United Mine Workers* and the retrial of the *Pennington* case in *Lewis v. Pennington*. Yet there was additional evidence introduced at the trial having particular significance to South-East's claim and which tended to emphasize that South-East's case was unique from either *Tennessee Consolidated Coal* or *Lewis*. (A single example is the evidence of the circumstances surrounding the cancellation of the sales agency contract between Consolidation and South-East in which Consol acted as sales agent for South-East's coal.) While some of the evidence introduced was circumstantial, which in and of itself might not support the jury's verdict, there was also direct evidence which, when coupled with the circumstantial evidence, raised plaintiff's case from one of mere suspicion or conjecture to a level where reasonable minds might have concluded liability upon the part of the appellants. After reviewing the record, it is concluded that there was substantial credible evidence to support the jury's verdict. The District Court's decision on this matter was correct and appellants' motions for directed verdict and judgment notwithstanding the verdict were properly denied.

III. ALLEGED IRREGULARITIES WITH RESPECT TO THE JURY

A. Mr. LaViers' Sr. Conversation With Two Jurymen

Consolidation contends that the District Court committed reversible error in not declaring a mistrial because of a conversation Mr. LaViers, Sr., of South-East Coal, had with two members of the jury outside of court during the trial. The conversation took place in a coffee shop in the hotel where some of the witnesses, jurors, attorneys and parties in the trial were staying. Mr. LaViers was seated by a waitress at a table which was situated next to another table where two jurors were eating breakfast. The District Judge, after examining Mr. LaViers,[16] found that appellants were not preju-

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16. The Court made the following examination of Mr. LaViers in ascertaining what took place in the coffee shop:

(Reporter's note:) "The following occurred at the bench in the immediate presence of counsel and the Court, and in the absence and out of the hearing of the jury:

"The Court: I want to clarify this other situation before we get into anything else. This is out of the presence or hearing of the jurors, at the bench, in connection with the statement made to the Court by Mr. Schmidt, counsel for the defendant Consolidation Coal Company, with reference to two of the jurors, Mr. Hill and Mr. Osborne, who were seen in conversation with Mr. Harry LaViers, Sr., at the Coffee Shop of the Phoenix Hotel about 7:30 to 8:00 o'clock this morning, October 11, 1968.

"Now, then, do you want to make any further statement? I am just asking.

Off the record."

diced by this unintentional contact and declined to grant a mistrial.

Appellants maintain that the case of *United States v. Harry Barfield Company,* 359 F.2d 120 (5th Cir. 1966), controls, and a mistrial should have been granted on the basis of that authority. Reviewing the decision in *United States v. Harry Barfield Company,* it appears that several facts instrumental to that decision are lacking in the present case. In the *Barfield Company* case the prejudicial out-of-court conversation took place in an elevator between the president of the company and two jurors. The president of the company made an effort to approach the jurors and then "cemented" the contact by volunteering information that his wife and her family dealt with the drug store owned by one of the jurors. The Court observed:

(Reporter's note:) "An off-the-record discussion took place at the bench.

"The Court: Come here, Mr. LaViers, please. Mr. LaViers, it has been reported to the Court that this morning in the Coffee Shop at the Phoenix Hotel, you, in the presence of Mr. Schmidt and Mr. Rowntree—

"Mr. Schmidt: Mr. Rowntree was not present.

"The Court: No.

"Mr. Rowntree: As I stated, I was there earlier.

"The Court: Yes. I don't know who else was there. But you were seated near or standing near or in the company — not 'in the company,' I don't want to use that term — but in contact with Mr. Hill and Mr. Osborne, who are members of the jury. Now, do you recall that incident?

"Mr. LaViers, Sr.: Yes, I do, Your Honor.

"The Court: Would you mind stating just what it was?

"By way of summation it is clear that the taxpayer president approached the jurors. They did not approach him. He sought to identify with juror Lockhart through the fact of knowing about his drug business. He then sought to cement the identity by giving the juror his wife's name which led to a conversation regarding his wife's family. He apparently also managed to find out that the juror from the radio station had known his brother."

"Mr. LaViers, Sr.: Yes. Mr. Rowntree had gone down to breakfast prior to my coming down. When I came into the Coffee Shop, I looked for him and found that the table where he was seated only had one chair and I was looking around for some other table to sit at, and the head waitress came and said, 'Well, just sit down here' — which was right across the aisle from Mr. Rowntree — and I sat down on the bench and ordered my breakfast.

And Mr. Hill was sitting next to me, and he asked me, he said, 'Do you know Mr. Oscar Evans who lives in Paintsville?'

And I said, 'Well, he doesn't live in Paintsville now; he has gone to Florida — but I do know Mr. Evans.'

And he said, 'Well, I used to board at his house.'

And he said he was quite a character.

And I said, 'Yes, I agree with that,' and, 'I knew him very well.'

And then I believe that part of the breakfast, not the main part, was served, and Mr. Hill then asked me if I knew Mr. Nelson Howard who lived in Paintsville; and I said yes, 'I know Mr. Nelson Howard; he came from Gallatin County; he was in the automobile business there and later was in the coal business, I know him.' Mr. Hill said he used to work for him. I said, 'Well, he was quite an aggressive merchant when he was there, he made a

(See the dissenting opinion by Judge Colman in the *Barfield Company* case, at p. 124, questioning the majority's characterization of these facts.)

In the present case Mr. LaViers was seated by a waitress next to the jurors. He did not seek them out. Furthermore, it was a juror who aproached Mr. LaViers with a question about whether he knew certain individuals. Obviously, Mr. LaViers could have simply ignored the juror, but the law does not require that when a person becomes a party in a lawsuit that he must renounce all social amenities and rudely ignore people who ask him questions. The juror's questions were answered by Mr. LaViers in a straight-forward polite fashion, with-

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lot of money and decided he would go into the farming business and bought a couple of farms down in Bourbon County, and I understand, lost what he had of his investment in these farms.'

I guess the rest of the breakfast was served about that time. I don't recall that there was — there was some gentleman came in on the other side, and they turned to him to speak to him. I don't recall any further conversation.

There was nothing about this lawsuit.

"The Court: Do you want to ask him a question?

"Mr. Schmidt: Mr. LaViers, there were other places to sit down in the Coffee Shop besides next to Mr. Hill and Mr. Osborne when you sat down? Isn't that true?

"Mr. LaViers, Sr.: Well, yes, sir, there are other tables for four and tables for two and the tables at the bench are for two, and the head waitress came along and tossed a menu down and just said, 'Sit down here,' and I sat where she put the menu. I didn't seek out this seat.

"Mr. Schmidt: You saw them sitting there?

out any attempt to ingratiate himself to the juror. There was no discussion of the case. The facts of *Barfield Company* which were of principal significance in that decision are lacking here and the case is clearly distinguishable from the present dispute. While, of couse, these types of contacts must be scrupulously avoided if at all possible, the fact that in this case the contacts were brought about by a coincidence of circumstances, there was no intentional "seeking-out," and no discussion of the case occurred, the District Court's denial of the motion for a mistrial was proper and clearly not an abuse of discretion. *United States v. VanBuskirk,* 304 F.2d 871 (6th Cir. 1962).

"'Mr. LaViers, Sr.: Oh, yes, I saw them sitting there.

"Mr. Schmdit: Was it in your mind that, even so, it wouldn't hurt to develop some sort of a social rapport with these gentlemen?

"Mr. LaViers, Sr.: No, Mr. Schmidt, that was not in my mind. I am by nature a person who talks to people in the elevator or wherever it might be, and I would be untruthful and unrealistic if I didn't say I do engage in conversations.

"The Court: How many minutes would be [sic.] assume, or how much time, I should say, would you assume your conversation or what you stated to the Court, or anything in addition to that, was consumed with either of these men?

"Mr. LaViers, Sr.: Oh, there were snatches of conversation, I imagine about ten or fifteen minutes. I was eating breakfast.

"The Court: That covered the whole period?

"Mr. LaViers, Sr.: Well, not the whole period of breakfast, but the period of the conversation.

"The Court: Do you want to ask him anything further?

B. ALLEGED ERROR IN THE DISTRICT COURT'S REFUSAL TO DECLARE A MISTRIAL BECAUSE OF CERTAIN CONDUCT OF A JUROR

Appellants contend that they were denied their constitutional right to trial by an impartial jury because the District Court refused to grant a mistrial upon learning of certain alleged misconduct of a juror. Two matters are alluded to as indicating that the partiality of one juror was questionable. First, an incident occurred during trial which allegedly was misconduct on the part of the juror. An attorney for the Union developed the following facts: the juror and his wife attended a social function in Lexington, Kentucky, during the trial. It appeared that the juror's wife was a soroity sister and

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"Mr. LaViers, Sr.: Mr. Rowntree has continuously cautioned me about this.

"The Court: Well, you see the point is, I mean, The Court accepts your statement that you didn't say anything about the case.

"Mr. LaViers, Sr.: We didn't talk anything about the case, Your Honor.

"The Court: But, you see, the difficulty is that this more or less currying of favor with a juror — while I realize it isn't currying a favor deliberately —but it has brought questions to people's minds. I realize some people are just naturally friendly, and Kentuckians are just that way — I know them pretty well — but we mustn't do anything like this.

"Mr. LaViers, Sr.: I would be very, very happy to avoid them.

"The Court: The Court is confident that you didn't do anything intentionally. That is the ruling of the Court.

Now, do you have anything you want to ask him?

close friend of the wife of a lawyer who practiced in the coal mining area of Eastern Kentucky. The juror was also a close friend of the lawyer. These people met at the social function, and the juror mentioned that a third lawyer who practiced in the same coal mining region was an attorney for the Union in the trial in which he was a juror and that this attorney was "a very able lawyer". Then the juror's wife made some comment about the present case being difficult "in following a conspiracy or in following just what they were driving at with all the reading and all." It was not at all clear whether the juror's wife mentioned the word "conspiracy" or not. On these facts a motion was made to subpoena the juror and the people involved in this incident and examine them. The District Court concluded that "nothing (had) been shown here to justify an investigation of this juror" and overruled the motion.

Appellant cites *Mattox v. United States,* 146 U.S. 140 (1892), as controlling and requiring that under these circumstances an examination of the juror should have been granted. Under the facts in *Mattox,* it was obvious that an examination of the jurors should have taken place. In that case allegedly a court bailiff, pres-

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"Mr. Rowntree: No.

"Mr. Schmidt: May I ask him a question?

"The Court: Yes, sir.

"Mr. Schmidt: Mr. LaViers, you have seen each of those gentlemen sit at the same table every morning?

"Mr. LaViers, Sr.: No, sir, they have not, as far as my knowledge, sat at that same table. They do sit in the Coffee Shop there at various places, but I don't recall seeing them at that particular place, Your Honor."

ent when the jury was deliberating the verdict in a murder case, stated, so that the members of the jury could hear him, that "this is the third fellow he (the accused has killed." In addition, during deliberation the jury or part of it was read a newspaper account of the trial that included the following remarks:

> "If he (the accused) is found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict.
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> * * *
>
> "It (the evidence) was so strong that the friends of Mattox gave up all hope of any result but conviction."

Under these alleged circumstances, the court should have ordered an examination of the jury to determine the accuracy of the purported misconduct. However, by no stretch of the imagination can it be argued that the facts surrounding the present incident of alleged misconduct approximates those in *Mattox*. While questions of jury improprieties are matters of degree, it cannot be said that the District Court abused its discretion in not ordering an examination of the juror and the other participants in the present incident without further representation or a stronger indication that some misconduct prejudicial to appellants' constitutional right to an impartial trial did in fact occur.

The second matter that appellants point to which they contend shows partiality upon the part of this

juror is that his insurance agency underwrote a real estate bond for the son of a former official of and present minor stockholder in South-East Coal Company. The juror was challenged for cause, but the District Court overruled the challenge. The examination of the juror showed that a $5,000 surety bond must be posted with the Commonwealth of Kentucky before a real estate broker can sell real estate. The juror's insurance agency underwrites the bond for the son of a former official and present minor stockholder in South-East Coal. The bond was first written several years before this litigation was commenced and simply has been renewed each year. Until informed, the juror did not know for a fact if he wrote the bond for the son or the father and, obviously, knew neither personally. Upon questioning, he stated that the fact he wrote the bond would not affect his judgment in any way. This case is distinguishable from *Commonwealth Coatings Corporation v. Continental Casualty Company,* 393 U.S. 145 (1968), cited by appellants to support their position that their challenge for cause of this juror should have been granted. In *Commonwealth Coatings* an individual acting as an arbitrator under a private contractual agreement had been an engineering consultant for one of the parties in the dispute and collected over $12,000 in fees in four years. The Supreme Court set aside an award made by the panel of three arbitrators holding that an arbitrator should disclose to the parties any dealings which might create an impression of possible bias. Factually and legally, the present case is different. Here a juror had only remote indirect contact with a party in a lawsuit. Even if the business contacts were more direct, all that *Commonwealth Coatings* requires is a disclosure of

these dealings. In the present case, the nature and extent of the juror's business contacts were disclosed and the District Court, upon examination of the juror, concluded that he could impartially hear the evidence and return a verdict free of any prejudice that might result from his business dealings. The District Court's refusal to grant the challenge for cause of this juror was not an abuse of discretion. *Holt v. United States,* 218 U.S. 245 (1910); *Cox v. General Electric Company,* 302 F.2d 389 (6th Cir. 1962).

IV. DAMAGES

A. The Jury Award of Damages

South-East sought damages allegedly resulting from the anti-competitive conspiracy in this case for a three and one half year period from April 26, 1962, to December 31, 1966. Two methods of computing these damages were used to arrive at a dollar amount.[17] The first method was a simple comparison between operating profits and losses[18] during the period 1952-1958, an arbitrary base period, with the operating profit and losses

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17. Computation of injuries by the first method produced a damages figure of $3,082,816. The damages figure produced by the second method was $2,896,713. The jury awarded damages of $2,410,452 or approximately $700,000 less than the damages computed by the first method and $500,000 less than computed by the second method.

18. Figures reflecting operating profit and losses rather than net income were used because these figures do not include such things as percentage depletion allowances which are treated as return of capital, interest payments (expenses) or income, capital gains and losses and dividend income.

for the period South-East sought recovery. A method similar to this was used in determining the antitrust damages in *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 258 (1946), and *Ford Motor Company v. Webster's Auto Sales, Inc.,* 361 F.2d 874, 885-886 (1st Cir. 1966).

The second method was more complex and was designed to meet certain objections appellants had to the first method. This method used various financial and managerial figures for the years 1964 and 1965 for a comparison with similar figures in 1962, 1963 and 1966. Thus, statistics during the actual damages period (1964 and 1965). Thus, statistics during the actual damages period (1964 and 1965) acted as a basis for computing damages for the entire period. Supporting this theory, South-East introduced six financial exhibits showing, in part: the effects higher mining costs and decreased production in 1962, 1963 and 1966 had on earning compared to the base years 1964-1965; the effect on earnings of two strikes in 1962-1963 and 1966 as compared with earnings in 1964-1965; lower price realization on coal in 1964-1965 than in the remaining years of the damage period; and the alleged effect the conspiracy had on South-East's price realization per ton of coal compared with the average price realization of the industry for the period 1962-1965. South-East maintains that by using this approach appellant's challenge to the validity of using figures for 1952-1958 for the comparison, because allegedly during the damage period internal and external economic conditions were less favorable than during 1952-1958, are effectively negated.

Appellants raise numerous issues regarding the validity of South-East's theories of damages. Mention

of four of the challenges will give some idea of the general nature of appellants' attacks. Respecting South-East's first method of computing damages, appellants contend that using the profit average of 1952-1958 for the comparison is unfair as "internal and external economic factors", i.e. less favorable mining conditions and a general overall depression in the coal market, varied between the years used as a basis and the actual damages period. The second method is challenged on the grounds that use of new equipment during 1964 invalidates the comparison of the financial and managerial date with the base period 1962-1963. The third objection is that both methods claim losses for Consolidation's refusal to handle South-East's coal and that these losses cannot be recovered from the Union. Finally, appellants complain that South-East's computed losses which were in part a result of its inability to get sufficient railroad cars to ship its coal and, therefore, were in no way attributable to the alleged conspiracy.

It appears that most of appellants' challenges to South-East's claims of damages are directed at the accuracy of the amount of damages and not the fact of damages. There was a general issue raised as to the lack of evidence showing that the proximate cause of Southeast's damages was the conspiracy; that is, the sufficiency of evidence showing the fact of damages. However, reviewing the record, it is clear that there was sufficient credible evidence from which the jury was justified in inferring the necessary causal relation between the conspirators' anti-competitive conduct and the claimed damage or injury. *Zenith Radio Corporation v. Hazeltine,* 395 U.S. 100, 125 (1969). The antitrust cases are legion which reiterate the proposition that, if

the fact of damages is proven, the actual computation of damages may suffer from minor imperfections. See, *Story Parchment Company v. Paterson Parchment Company,* 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures, supra; Zenith Radio Corporation v. Hazeltine, supra; Ford Motor Company v. Webster's Auto Sales, Inc., supra; Atlas Building Products Company v. Diamond Block & Gravel Company,* 269 F.2d 950, 958 (10th Cir. 1959); *North Texas Producers Association v. Young,* 308 F.2d 235, 245 (5th Cir. 1962); *Flintkote Company v. Lysfjord,* 246 F.2d 368, 392 (9th Cir. 1957).

Appellant's principal grounds for objection to the jury verdict is that internal and external economic conditions and decisions of the management resulted in South-East's losses, and not the conduct of the alleged conspiracy. But the question of whether certain of South-East's losses were attributable to the conspiracy or other economic factors was for the jury's consideration and determination. *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.,* 383 F.2d 97, 106 (5th Cir. 1967), cert. denied, 390 U.S. 904; as is the question of the credibility of the witnesses used in showing damages, *Atlas Building Products Company v. Diamond Block & Gravel Company, supra* at 959. It is concluded that there was sufficient credible evidence to support the jury's verdict as to the fact of damages and the amount of damages was computed as precisely as capable under the circumstances.

B. ATTORNEYS' FEES

Appellants object to the award of attorneys' fees as unreasonable. A party seeking review of an award of attorneys' fees in an antitrust case has the burden of

clearly demonstrating error in the factual basis of the award or an abuse of discretion. See, *Armco Steel Corporation v. State of North Dakota,* 376 F.2d 206, 213 (8th Cir. 1967); *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190, 221 (9th Cir. 1964). In this case appellants have not shown either an error in the factual basis of the award or an abuse of discretion.

The judgment is affirmed.

PHILLIPS, Chief Judge. (Concurring.) I do not interpret the opinion in this case to conflict with the opinion of Judge Edwards, in which I concurred, in *Ramsey v. United Mine Workers of America,* 416 F.2d 655 (6th Cir.), cert, granted, 38 U.S.L.W. 3379. I concur in the opinion prepared by Judge Brooks.

APPENDIX B

[See Jt. App. pp. 248 et seq.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
RICHMOND

No. 303

SOUTH-EAST COAL COMPANY
v.
UNITED MINE WORKERS OF AMERICA
and CONSOLIDATION COAL COMPANY

Memorandum
Filed April 1, 1969

This action arises under the antitrust laws. After a trial extending over some four weeks, the jury returned a verdict in favor of the plaintiff, South-East Coal Company, of $2,410,452.00 in damages. Pursuant to section 15 of Title 15, United States Code, judgment was entered for three times this amount.

The record is before the court on the separate motions of the defendants, United Mine Workers of America and Consolidation Coal Company, for a directed verdict and for judgment notwithstanding the verdict, or in the alternative, for a new trial. They set forth numerous grounds in support of their motions, including allegations that the evidence was insufficient to support the verdict, that the verdict was contrary to the law and the evidence, that the court made various errors with regard to the admission of evidence, that the court erred in failing to admonish the jury not to consider certain evidence, that the court erred in permitting a witness

to use certain papers to refresh his recollection, that the court erred in failing to declare a mistrial because of an out-of-court conversation between an agent of plaintiff and two jurors, that the court erred in failing to declare a mistrial because of the argument of plaintiff's counsel, that the court erred in failing to sustain the challenge for cause to one of the jurors, that the damages were grossly excessive and speculative, that the court made numerous errors in instructing the jury, and other allegations of error. I do not intend in this memorandum to examine each of the arguments of the defendants individually or in detail. Nor will I attempt an exhaustive discussion of every issue raised in the excellent and very comprehensive briefs submitted by the parties. Instead I will discuss the various groups of issues in a general fashion.

This case, taken as a whole, was conducted in accordance with the guidelines set out in United Mine Workers of America v. Pennington, 381 U.S. 657, and Lewis v. Pennington, 6 Cir., 400 F.2d 806, cert. denied 37 L.W. 3209.

I.

The defendants contend that there was insufficient evidence or a lack of "clear proof" to support the verdict of liability.

To prove a conspiracy in violation of the antitrust laws, the plaintiff need not introduce direct evidence. The proof may rest, as it frequently does, on circumstantial evidence. Viking Theatre Corp. v. Paramount Film Distributing Corp., 3 Cir., 320 F.2d 285, 299, affirmed 378 U.S. 123, reh. denied 379 U.S. 872, reh. denied 382 U.S. 1001; Eagles v. Harriss Sales Corp., 4 Cir., 36

F.2d 927. In American Tobacco Co. v. United States, 328 U.S. 781, 809-10, the United States Supreme Court clearly stated: "The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words."

Fully aware that reasonable inferences, but not speculations, are a sufficient basis for finding antitrust liability (Ramsey v. United Mine Workers, E.D.Tenn., 265 F. Supp. 388, 432), this court is of the opinion that the existence of a conspiracy, including the requisite "predatory intent", even under the stringent clear proof test.

II.

The defendants contend that the plaintiff failed to prove, by clear proof or otherwise, that it was injured by a conspiracy on the part of the defendants, that plaintiff's proof of damages was too speculative and conjectural to have been submitted to the jury, and that the damages awarded were grossly excessive, not supported by the evidence, and the result of passion, prejudice and unaccountable caprice on the part of the jury.

At the trial, plaintiff introduced proof of damages under two theories. First, plaintiff attempted to show damages by comparing its operating profits from 1952 through 1958 with its operating losses in the period of alleged damage, May 1, 1962, through December 31, 1966. Second, plaintiff attempted to show damages by analyzing the business during the damage period.

It is well settled in actions brought under the antitrust laws that, although a verdict may not be based on mere speculation or guesswork, the jury may make a

reasonable estimate of the damage based on relevant data and on probable and inferential proof. Exactitude in the proof of damages is not required. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264. Indeed, precision is often impossible in an action of this nature. "The determination of damages in an antitrust suit, however, almost invariably requires a certain amount of speculation, no matter how informed." Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 152 (Marshall, J., concurring). It should also be noted that elementary concepts of justice and public policy require that a wrongdoer must bear the risk of uncertainty which his wrong has created. Bigelow v. RKO Radio Pictures, supra at 265.

Defendants complain of numerous aspects of plaintiff's damage evidence as being misleading and inaccurate. But the accuracy of plaintiff's testimony is a matter going to its weight, not its admissibility. Ford Motor Co. v. Webster's Auto Sales, 1 Cir., 361 F.2d 874, 886.

Defendants contend that plaintiff's losses were the result, not of a conspiracy, but of its own bad business judgment and changes in the market and its methods of operation. There may well have been many factors which contributed to plaintiff's losses. But it is not necessary for a plaintiff in an antitrust suit to show that the conspiracy is the sole, or even the most substantial, cause of damage. It is enough for a plaintiff to get to the jury if he shows that the conspiracy is a substantial cause. Haverhill Gazette Co. v. Union Leader Corp., 1 Cir., 333 F.2d 798, 805-06, cert. denied 379 U.S. 931, reh. denied 379 U.S. 984; Perma Life Mufflers v. International Parts Corp., supra at 143-44 (White, J., concurring).

On pages 3518-3520 of the Transcript, this court adequately instructed the jury with regard to defendants' theory that any losses suffered by plaintiff were not the result of the alleged conspiracy and hence not to be included in any award of damages.

III.

The defendants make numerous contentions with respect to alleged errors and prejudicial statements made by the court in its instructions and with respect to the refusal of the court to give their suggested instructions.

The defendant, United Mine Workers, submitted 26 numbered requested charges, and the defendant, Consolidation Coal Co., submitted 74 numbered requested charges. Either of these sets of requested instructions, if given in toto, would have contained errors and would have been grossly one-sided, even though both contained a great many correct statements of the law. A court, in charging the jury, should not make statements of the law in the abstract, without any relevance to the issues to be decided, in order to avoid confusing the jury. Moreover, a court is not obligated to use appropriate and applicable suggested charges if it gives a charge embodying the same rule but in different language. Tyree v. New York Central R.R. Co., 6 Cir., 382 F.2d 524, cert. denied 389 U.S. 1014; Westmoreland v. Memphis Transit Co., 6 Cir., 305 F.2d 71.

The charge to the jury must be considered as a whole. This court is of the opinion that the charge, so considered, favored neither the plaintiff nor the defendants and presented to the jury a sharp, clear issue for

their determination. This language from Cobb v. Union Railway Co., 6 Cir., 318 F.2d 33, cert. denied 375 U.S. 945, is applicable:

> "Flaws can be found in almost any charge by separating certain paragraphs from the whole to determine whether it gives the jury a correct understanding of the propositions which they are to decide and the pertinent principles of law which shall guide them in their decision." 318 F.2d at 37.

IV.

Defendants complain that the court in its instructions erroneously characterized the Protective Wage Clause to their prejudice and failed to give adequate instructions with regard to the Protective Wage Clause and the 80 Cent Clause.

By examining certain portions of a charge to a jury out of their context in the whole charge and in the trial, one can frequently find flaws. This is especially true in the case of such a protracted trial as this was. Therefore, as noted above, the charge must be considered as a whole to determine whether the substantial rights of the parties were prejudiced. Cobb v. Union Railroad Co., supra.

This court is of the opinion that the charge to the jury, taken as a whole, fairly and accurately presented the substance of the Protective Wage Clause. Any inaccuracies in the instructions were inconsequential and certainly rectified by the court's admonition to the jury: "You are not to accept what I may say (in commenting upon the evidence) as necessarily true." Transcript 3492.

Memorandum.

The Protective Wage Clause is capable of two reasonable constructions, and the one should be adopted which does not result in a violation of law. Lewis v. Pennington, supra; Ramsey v. United Mine Workers, supra at 412. Consequently, the jury was instructed twice that the contract between the United Mine Workers and the coal operators was not in itself unlawful. Transcript 3507, 3512. Nevertheless, the execution of the contract, including the Protective Wage Clause, was evidence in the case which the jury could consider along with all the other evidence.

V.

It is contended that the court failed to instruct the jury properly on the defense of in pari delicto. The most recent decision by the Supreme Court on this defense is Perma Life Mufflers v. International Parts Corp., supra, which produced six opinions, none of which was supported by a majority of the Court. The instructions in the instant case follow what appears to be the law as reflected, however obscurely, in *Perma Life Mufflers,* namely that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover for the period that it remained a party to the conspiracy. Transcript 3515-3516. It is doubtful that an instruction on the defense of in pari delicto should have been given at all. If anything, the instruction given was unduly favorable to defendants.

Memorandum.

VI.

It is contended that the court should have granted a mistrial during the course of the trial because of an improper contact between Mr. Harry LaViers, Sr., president of South-East Coal Co., and two members of the jury. The contact occurred one morning in the hotel coffee shop when the head waitress seated Mr. LaViers at a table next to one occupied by the two jurors. They engaged in brief bits of conversation, but nothing was said about this lawsuit and Mr. LaViers did not intentionally attempt to curry favor with the jurors. Transcript 1770.

The determination of whether irregularities or alleged misconduct of this nature should require a new trial is a matter within the sound discretion of the trial judge. United States v. Van Buskirk, 6 Cir., 304 F. 2d 871; Thomas v. Nuss, 6 Cir., 353 F. 2d 257, 259. The court should not grant a new trial because of an irregularity not attended with any intentional wrong where it appears to the court's satisfaction that the interests of none of the litigants were prejudiced. California Fruit Exchange v. Henry, W.D.Penna., 89 F. Supp. 580, affirmed 184 F. 2d 517. This court is satisfied that the contact between Mr. LaViers and the two jurors did not influence the verdict in any way.

The case of Noble v. McAllister Dairy Farms, 52 Ohio Ops. 52, cited by defendant Consolidation Coal Co., is factually distinguishable from the instant case. To the extent that the statement of law from *Henry,* supra, set out above, conflicts with any of the broad propositions stated in *Noble,* I decline to follow *Noble.*

VII.

The defendants allege error in failing to sustain their challenges of juror Arnspiger. This juror had written a real estate bond for a stockholder and retired director of plaintiff (or for his son) but was not personally acquainted with him. He stated that this fact would not influence him.

The competency of a juror is for determination by the trial court, which is vested with a wide discretion in determining competency. Cox v. General Electric Co., 6 Cir., 302 F. 2d 389, 391. In view of the circumstances surrounding Mr. Arnspiger, it was within the court's judicial discretion to retain him on the jury. The dictum in Commonwealth Coatings Corp. v. Continental Gas Co., 37 L.W. 4037, decided November 18, 1968, does not require a new trial in this case.

In sum, this court is of the opinion that the verdict was supported by competent evidence and that the trial was free from any error which would warrant a new trial. The motions of the defendants for a directed verdict and for judgment notwithstanding the verdict, or for a new trial, should be overruled.

An order in conformity with this Memorandum is this day entered.

MAC SWINFORD, Judge

A True Copy Attest

DAVIS T. MCGARVEY, Clerk
U.S. District Court

By HELEN M. JENNIUE

APPENDIX C

[Appendix C consists of the District Court's Instructions to the Jury in *South-East Coal Company v. Consolidation Coal Company and UMWA.*]

Instructions to the Jury

[1824] Now, I feel it is important to give you some explanation of the background of the coal industry in Kentucky, and very briefly. I do not want to detain you any longer than necessary in this charge, but I want you to be able to feel that you can do so, to decide this case today. You are not under any compunction to do so. You may come back tomorrow or as many days as you think is appropriate.

I realize it has taken a long time to try it. There is quite a lot of evidence, both from the witness stand and by way of depositions and transcripts; quite a number of exhibits that you will want to consider, but the issue in this case is very narrow and before I conclude my charge to you, I will draw the issue very sharply for you. You will not have any difficulty in recognizing what it is that you have to decide.

I believe, in the light of all the evidence and all the inferences which may be drawn from it, that you can arrive at a fair and just verdict.

The coal industry is a fascinating and interesting industry. As has been brought out here in the evidence, it

goes back a long way. The United Mine Workers, or the workers, who are the men that produce the coal, who go into the pits and actually produce the coal and the operators who have risked their capital in the industry, have made a distinct contribution to our whole economy.

[1825] They are entitled, as the law provides, to be protected in those rights. They are entitled, both as the plaintiff here is entitled to be protected, and the defendants are entitled to be protected, and so long as they are all observing the law and the responsibilities of their business, then the economy will be protected itself, and the people of the United States and of the world, because this is a world proposition. Much of this coal that we dig here in Kentucky is exported and it is, after all, a world proposition. But all of us will profit by a healthy condition of the coal business.

Eastern Kentucky has a coal field and western Kentucky has a coal field, which we are not concerned directly in this lawsuit, and those of you who have never visited these coal fields or any coal fields, some of the language used in this trial might be a little obscure and you might not feel that you clearly understand just what it is all about when they talk about tipples and "sweetheart contracts" and "coal contracts" and production and organization of coal companies and organization of coal mines.

I am going to very briefly explain some of these things to you.

A "tipple" is the place where the coal comes out of the ground and where it is loaded into cars to be hauled to market. Now, you understand the old system, many

years ago coal was brought directly out of the ground, placed into coal cars and hauled away by the railroad companies. It was sold as it was, either good, bad, or indifferent, but you understand modern conditions, coal is brought out of the ground and a great portion of it is loaded into trucks and it cannot be sold as it may appear or at least a part of it cannot be sold as it comes out of the ground, but it must be cleaned.

This is a highly competitive business. There are other coal fields in other States and other places and foreign markets even, and so the coal must be cleaned and [1826] taken care of and made more salable. So, when we speak of a cleaning plant, sometimes the terms are interchanged — "tipple" and "cleaning plant" are interchanged — and to the lay people it may not be clear.

But these cleaning plants are tipples where this coal is brought and put into the cleaning plant and cleaned and graded and then loaded into freight cars or trucks for sale. This is a major proposition. It is not just a matter of — you may have driven through the mountains of Kentucky and seen a little wooden tipple, and somebody says "There is a tipple halfway up the mountain," where coal is being brought out and being brought down by a conveyor system, which, in itself, is still in operation.

But, under modern methods, it is frequently required that this coal be processed and that these coal-cleaning plants or washing plants, as they are sometimes called, are involved in the production just the same as digging the coal or bringing it out or blasting it out or by stripping methods or whatever it may be.

The cleaning of the coal or processing of the coal is a part of the coal production. So, when I say "tipple"

as used here, I mean the last place that the coal is before it is hauled to market.

Now, you have also heard the term here" sweetheart contract." I am not sure that you clearly understand. It sounds very romantic, I am sure, but in this sense, where there was an agreement and there was an agreement under this 1958 coal wage agreement, that the United Mine Workers entered into this contract nationwide thing, as they claim, to make everyone who produced coal to pay what is known as a Welfare Fund. The Welfare Fund was 40 cents that was put on every ton of coal that was produced by the miners.

Now, that Welfare Fund went into the retirement plan and various other social benefits to the miners themselves, the building of the hospitals that some of you may have some experience and knowledge of, or taking care of these [1827] miners and their families in illness and their general welfare to see that they were given a better condition of living in that respect.

So that Welfare Fund or that 40 cents was an attachment on each ton of coal that was produced, and naturally as is a business arrangement, cost production is included and involved in fixing the price of the coal.

So that cost was added to the retail or wholesale price of the coal from the producer to the wholesaler or retailer. Now, that had to be, as it is contended, on a national basis in order for these companies to compete with each other from the various coal fields in the United States.

The United Mine Workers is not just a Kentucky organization, it is a national organization that was

begun back in 1890, as a combination of the miners for their self-preservation and for the benefits which they felt by union they could have which as individuals they might not have.

So that national wage agreement included not only the wages, not only the standards which were set by the contracts that had been in effect since 1950, but in 1958 it added this Welfare Clause to it. That Welfare Clause is the thing that you have heard referred to as the Protective Wage Clause. They have used that term. I sometimes think lawyers are so familiar with their case that they may not realize what they say doesn't always have significance to jurors.

But that Protective Wage Clause in the 1958 contract was to the effect that the operaors would not handle coal from any company that was not under that contract.

Now, that is what it means in short, that this Protective Wage Clause — take the Consolidation Coal Company, and use it as an example. It produced coal. I don't know whether it does now or not. It used to. It used to own mines in Eastern Kentucky. I am not sure that it does own any now. I believe it does own some mines in Virginia. At any rate, it used to be a big actual miner of coal in Eastern Kentucky. It sold its own coal and it also bought coal and resold it. It bought coal from other [1828] producers, independent producers, such as it was. It bought coal from captive mines. In other words, it was in the coal business, in the coal production business and the coal handling business and the coal sale business. So there were other companies such as this, and this contract provided that

these companies would not handle anybody's coal unless it was a coal producing company that had signed one of these national wage agreements with the United Mine Workers.

You have heard the term used here "captive mines." Well, a captive mine is a mine, just to use an example, like Inland Steel at Wheelwright. They have a big tipple there. I think that tipple cost five or six milion [sic.] dollars. They have a big cleaning plant. Those things are so enormous we think of a building costing four or five million dollars, but we have got a great big building, and that is what this is.

As a matter of fact, I have seen that tipple there at Wheelwright, and it has a provision that picks up a freight car, the whole freight car and shakes it just like that, and that is a modern method which is used in the production of coal for sale.

So those companies, like Inland Steel, or like other companies that use a lot of coal in the production of stel, own their own mines, but very frequently there are types of coal or kinds of coal that they cannot use in their manufacturing process, or they may have for a time being an overproduction. So they sell that coal and they might sell that coal, as it has been testified to here, by some of the witnesses, to companies as the defendant, Consolidation Coal Company, for resale. Sometimes the captive mine owners have to buy coal, and it just depends on the circumstances and the particular need which might arise at a given time. But that is what is meant by a captive mine. That is a mine that is not in the business primarily of producing coal for sale, but is in the coal mining business for its own coal, and to use

its own coal and only sells its oversupply, or that which it cannot for some reason or other use in its business.

[1829] Going back to this question of the sweetheart contract that I brought up a few minutes ago, a sweetheart contract is a special dispensation to a coal producing company because of a circumstance which that company, says, "I cannot survive if I have to pay this 40-cents Welfare clause provision, if I have to observe it. I cannot pay that much additional and have that much additional price on my coal and sell it," or, "I cannot meet some of these other conditions," whatever they might be, some of the conditions maybe as to the wages, the cost of labor, or for some reason a company or an individual will say, "Well, I cannot sign that contract."

Then it is contended that the union, who is seeking to have these contracts executed by all coal producers for the benefit of all of the miners as a group, will say to that person, "Well, you go ahead and sign it anyway. We won't insist on it." In other words, it is showing favoritism, for one reason or another, to a particular group or individual group of companies or individual coal producers.

Now, that is what they mean when they say a "sweetheart contract."

As I say, as it has been brought out here, it is quite an educational thing to me, and I am sure it is to you, this development which we have seen here from this witness stand in the progress of this case. This coal is sent from Kentucky to the northwest, up to what is known as the Lake Region, to Minnesota, all up into the Great Lakes Regions. It wasn't brought out here,

but I would assume wherever there is steel mills there is a demand for it, and where there is other industry that has to have energy from heat, that coal is used and sold.

It was the business of Consolidation Coal Company, the defendant here, to acquire that coal from producers and transport it and sell it, as it would seem from our case here, primarily up in the northern part of our country. So that is the matter which up to this point has been brought out here.

[1830] As I said before, I don't want you to think because of this length of time that we have had to try this case, the number of witnesses and the number of exhibits, and the number of figures, the hundreds of figures used here, and the testimony that has been read here for hours at a time from transcripts and from depositions, that you are so confused that you don't know what it is all about. It does sound like such a magnanimous big operation that it is hard to find out. But the issue in this case, notwithstanding all of that, is very, very sharp. I assure you that before you go out of that jury box that you will understand what it is you have to decide.

Now, you will have to apply your recollection, as far as you are capable of doing it, to what was said.

In other words, you can't remember all the details and everything that was said, but you gather from these witnesses, from their demeanor, from the things they say and the inferences that may be drawn, one after another, and from these depositions, an idea about this case. You get an idea. There is an atmosphere

about a lawsuit, and you are not expected as jurors to just take it step by step by step. That is an impossibility.

So you are to use your recollection of that evidence. You are to get an idea from the whole picture of this thing that this case should be decided one way rather than another. Now, that is a common-sense approach to it. By discussing it together, you arrive at a fair and just verdict, and I am sure you can do that.

I am depending upon you. I am trusting you to do it. You don't realize possibly, but this court is the most important thing in the world. What you do here in this case is going to reflect credit or discredit upon this court. To me there is nothing that compares with it in the whole idea of free government, that a procedure should be had where citizens come in and ask their fellow citizens under defined rules of law and under a Constitutional guarantee of justice to decide an issue of fact. It is just as simple as [1831] that. But they are dependent upon each of those jurors to have an understanding and appreciation of the seriousness of their job, not that it is impossible, it isn't, but that they should have an understanding and an appreciation.

What you decide is striking at the very foundations and roots of our government, because if justice fails, nothing else matters. To me there is nothing to compare with the responsibility that rests upon me as the presiding Judge of this Court, upon these lawyers, who are officers of the Court, upon you, who are the jurors, who actually, after all, are going to make the decision.

So, consequently, each of you carries with you the integrity of this Court when you go into your jury

room. I will enter the judgment. But my judgment must be based upon your verdict. If your verdict is unfair or unreasonable or unjust, then my judgment will be that way, and that will be my responsibility. If your verdict is fair and just, it is a reflection upon your intelligence, upon your integrity, and upon the ideals which we think are sacred in the administration of justice.

Now, your verdict must be unanimous. By unanimous verdict, it means it must be the verdict of each juror. You cannot arrive at your verdict by holding a primary election in the jury room or taking a majority or any other percentage of the number of jurors. It must be the verdict of each juror. Each juror must make up his or her own mind as to what the verdict should be.

That, however, does not mean to recommend or aggrandize; doesn't mean that you are to go into the jury room and take an uncompromising view without first considering the reasons, recollections, and arguments of your fellow jurors.

You may be assured, and I don't suppose any of you ever knew each other before, but you may be assured from me that each person on that jury is just as anxious to be a fair juror as you are. No one has any ulterior purpose of [sic.] motive.

[1832] What each one wants to do is, I am sure, to decide this case and reflect upon this Court and to do justice and to reflect credit upon himself or herself as a juror.

I have never served on a jury, but I have known a lot of people who have, and I have had them tell me

sometimes you go to the jury room and some one or two or more of the jurors will immediately announce what the verdict should be, and that everyone will have to agree with them or "we will stay here all day" or "all night," or some other such extravagant statement, mistaking, I am afraid, hard-headedness and stubbornness and stupidity for strong-mindedness.

So, I don't want you to fall into that trap. I do what you to exercise certain of your own free will as to what the verdict should be and stand up for your theories and argue about them, but realize that the jury is composed of twelve people, not two or three or seven or nine, with the idea that twelve disinterested citizens of this district can take a given set of facts and, with certain rules of law, can apply those rules of law to those facts and come up with the right answer.

I don't know why there are twelve people on the jury. I don't know why there are twelve of so many things, but that figure has come on down through the corridors of time, this idea of twelve.

There are twelve months in the year; Christ had twelve disciples; and there are twelve in a dozen of oranges — and I don't know why that rather odd number exists, but it has carried in our whole historical understanding of things and plays a significant part.

Twelve months in the year, various things that are brought in to us, that number.

So, I hope that you will, when you go to the jury room, realize after all this must be a relative give-and-take matter. They didn't just ask one person to decide the case; they asked twelve.

[1833] I would not require you to make a verdict, I couldn't if I would, and I wouldn't if I could but I do want to impress upon you the importance of making a verdict, if you feel that you can conscientiously do so.

This case has taken this length of time to try. I don't want you to sacrifice any principle on an expedient, and I am sure we have to be practical about things, and it has taken a long time to try; and unless you can make a verdict, we will have to go through this again—which is expensive, both in money and in time, and an awful lot of people, including jurors, as you know, who would have to sit here and hear it all again.

So, if you feel that you can reasonably and honorably do so, I hope that you will return a verdict. After all, it can be decided, and I am sure that you realize that and will do so, if you feel you can conscientiously make a verdict.

Now, in the Federal Rules—which is not true in the State courts, and possibly some of you have served on juries in State courts; in the State court, the judge gives written instructions, in Kentucky, and the lawyers have those instructions and use those instructions many times, very frequently in arguing their case to the jury, instructions in writing—in the Federal Courts the case is concluded, insofar as the introduction of evidence and the arguments of counsel are concerned, and then the trial judge gives a charge to the jury, as I am doing now, and gives the law and the rules of law which must guide the jury in determining the case.

It is the privilege of the judge, in so doing, to comment upon the evidence.

Now, I do not propose to, and certainly would not presume on you to undertake to review all of this evidence in this case. I couldn't do it if I wanted to. I can't remember it that well, and I would not presume upon your time or your patience by undertaking to go into a long exhortation and recitation of what various witnesses may have referred to or said during this trial.

[1834] But, if I should comment upon the evidence, if I should make reference to it, you are not to consider what I may say as all of the evidence. You are not to consider what I may say as all of the important evidence. You are not to consider what I may say as all of the important evidence on a given point.

You are the triers of the facts and it will be for you to recall what that evidence was and draw your own deductions and inferences from it.

You are not to accept what I may say as necessarily true. I certainly would not intentionally make a mistake, tell you or give you a wrong statement, but you are the triers of the facts, and it will be for you to recall what that evidence was and what proper inferences may be drawn from it.

Now, this is a damage statute. Plaintiff here, Mr. LaViers and his son and his company, South-East Coal Company, which has been described to you here in some detail, are seeking to recover damages for an alleged wrongful act, committed, as they say, and as they claim, by the coal operator, Consolidation Coal Company, and the coal producer—that is, the laboring organization that brought the coal out of the ground—and that, as Mr. LaViers contends and claims, that he has been damaged by that arrangement which is, according to all al-

legation, wrongful and unjust and unlawful arrangement, and he is entitled to recover the losses he has sustained as a direct result of that unlawful agreement between these two defendants.

Now, in order to recover, the South-East Coal Company must sustain the burden of proof; in other words, if no proof was offered, there would be no judgment for the plaintiff. It is his responsibility to offer proof to establish the facts that he claims.

And the defendant has the right, as you have seen here, to offer proof to contradict those facts or to explain those facts or to justify its conduct, which may have been brought out by witnesses for the plaintiff in support of its allegations.

[1835] But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by "burden of proof," it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of "burden of proof" with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.

But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

Should it fail in its proof, under this rule you should find for the defendant.

To establish the preponderance of the evidence means to prove that something is more likely so than

not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

In determining this fact, you should consider the testimony of all witnesses, both those who appeared on the witness stand and those who gave their testimony by deposition, or whose testimony was offered by transcript, regardless of who called the witness in other words, consider all the evidence, not just the plaintiff's evidence, not just the defendant's evidence, but consider all of the evidence.

You are to give consideration to all exhibits received in evidence, regardless of who may have produced them.

Such an anti-competitive conspiracy — and that is what this is; in other words, it is claimed by the plaintiff here that this arrangement was restraining competition, was monopolizing the field of coal production, and that you either had to belong to it or you were likely to be put out of business or suffer substantial financial loss — and [1836] such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof.

Now, that is the law.

On this part of the case, I want you to give consideration to that in connection with the other things that I shall advise you. Now, this is based upon a claim by the plaintiff that the defendants have been guilty of a

violation of law and are, therefor, answerable to this plaintiff in damages under the provisions of the law. That is somewhat repititious of what I just got through saying to you, but I may appear to be a little repititious. It is rather an involved matter to get all I must say to you into these instructions, and sometimes I may appear to be repititious for fear that I may have overlooked some matter and repeat it.

The law on which this claim is based is known as the Sherman Anti-Trust Law. This anti-trust law goes back to 1890. It was passed during Harrison's administration in 1890. It didn't have any teeth in it until the Clayton Act was passed in 1912.

The Clayton Act provides for the punishment for violation of this law, and so the Sherman law is an old law, and so is the Clayton law, but about twenty-two years apart in their enactment.

The right to invoke the provisions of the Sherman Anti-Trust Law is provided in what is known as the Clayton Act. Don't get confused, members of the jury, with the Clayton Act and Sherman Anti-Trust Law — all these things that sound so legal.

Don't think, "Well, I don't quite understand that," because I will clarify the whole thing before you leave your jury box.

The pertinent part of Section 1 of the Sherman Act is as follows:

"Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[1837] The pertinent part of Section 2 of the Sherman Anti-Trust Act is as follows:

"Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a violation of law."

Section 15 of the Clayton Act provides that: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States."

I am not reading from the Act now; this is my own copy. A conspiracy between employers and labor founded with the intent of driving competitors out of business is a violation of the Sherman Antitrust Law.

Now, as I say, this Sherman Antitrust Law and Clayton Act and these things sound very legalistic. But it is a simple proposition. It is a matter for the protection of the people in their free exercise of their will, and I am sure you can well recognize, if there had been no antitrust laws, probably none of these people here in this courtroom now, in this lawsuit, would have been in existance. If there had been no antitrust law, this country would have been like they said Japan was at the beginning of the second World War. In Japan everybody worked for one of seven big corporations, whether you were a doctor, lawyer, dentist, teacher, or whatever you might be. You had to be working for one of seven big outfits, because they had monopolized all the fields that there were, and there was no possibility of an individual competing in those fields. So we can understand this

Sherman Antitrust Law, which is for our own protection and the protection of all of these litigants, just as well on one side as the other, meaning that the Government said, the people of the United States said, by enacting these two laws, the Sherman Act and the Clayton Act, that you have no right to go into a field of endeavor and enter into agree-[1838]ments with each other and monopolize the fields so that there is no competition, because when there is no competition, then you can name your own price. In other words, if there was only one oil company in our country, instead of numerous oil companies — they may have interlocking directors, or something of that kind, and I am not going into that now — but if there was only one oil company and you could only buy gasoline when you drove up to a filling station from one company, they could put the price at anything they wanted to, either take it or leave it. You had no place else to go. So that is what these laws are. That is what the purpose of it is. That is what the enactment was entered into with the idea of protection and leaving a competitive field in all industry and in all business.

Now, the plaintiff here is claiming that these two institutions entered into a conspiracy with each other to monopolize the coal industry.

In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.

It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not

there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff.

You are instructed that if you return a verdict for the plaintiff it must be against both of the defendants. In other words, you cannot return a verdict against one of the defendants and not against the other. Under the record of this case, they are either both guilty or neither of them is guilty of the charges made by the plaintiff.

[1839] To bring this matter down to this particular case, and the evidence, it is the plaintiff's claim here, admitting there is a contract, they did enter into a contract, but it is the plaintiff's claim here that this contract between the defendant union, the coal producers, the miners, that beginning in 1950 they had what is known as a collective bargaining arrangement, the miners and all those engaged in the production of coal.

Now, the law does not make it unlawful for them to combine for the purpose of making a union for the purpose of protecting their rights and for having a bargaining agent, so you are not to consider because the union is composed of a great many miners, all of the miners in this Eastern Kentucky who are members of it, that of itself is not unlawful. The courts have expressly said so.

The law has expressly said so in what is known as the LaGuardia Act that was passed by the Congress. That is not unlawful.

But in 1950 they entered into a contract using the United Mine Workers, and under the law they have a

right, the workers have a right to have a bargaining agent.

In other words, it used to be if you ran a coal mine you hired Dick, Tom and Harry as they came up to the window, and you hired them and gave them whatever you could hire them for, and whatever they would agree to take, and you hired them as individuals.

Then under the national law and under the national policy, the labor laws, as we have produced under what is known as the Labor Act, and the LaGuardia Act and these other Acts of Congress, they were allowed to bargain collectively. They didn't hire one man for so much and another for so much, but the miners and other workers in other industries were allowed to bargain collectively and to select a bargaining agent.

Now, these miners in this field selected the United Mine Workers and joined the United Mine Workers, and had [1840] the United Mine Workers as their bargaining agent, and so their agency through its leadership met with the coal operators, the producers, such as the Consolidation Coal Company here, and others of similar type, and entered inot [sic.] a contract in which it said all of the miners who work for this company will get the same thing, and that we will not hire anyone who is not a member of your union. That is what is known as a closed shop. We will not let non-union members work in our mine. We will agree to pay our workers with this contract so much, so many benefits, and various things.

Now, that went into effect in 1950. It was, I believe, a two-year contract. Anyway, however long it was to last, it had to be from time to time amended, and was

amended from time to time until the contract of 1958. The 1958 contract had this Protective Wage Clause which they said added an additional clause, that they will not purchase coal from any producers that are not under the 1958 contract, and they entered into that agreement with the Defendant Consolidation Coal Company.

The plaintiff, South-East Coal Company, signed that contract, and it is shown here that Mr. LaViers, who was the president or officer in that company, had gone along with that, whether wanting to or not. It is said that he did do it. I believe he testified to that. And that contract provided for the Welfare Clause.

It produced a lot of confusion in the industry in the eastern part of Kentucky, the miners insisting that all coal operators should sign this contract and that all of them should have the same benefits, both the big companies and the little companies, the big operators and the little operators, and it caused a great — I don't want to go back to the instances which maybe you recall having read — but there was quite a lot of confusion in eastern Kentucky growing out of the efforts of the UMW to have all miners sign this agreement. That is this agreement, in 1958, containing this Protective Wage Clause.

[1841] Some of the contract—or some of the operators said they couldn't sign it, wouldn't sign it. Problems arose from that. They sought to operate then by this non-union labor and some union labor and some who were willing to work without a contract.

But the majority of the miners said, "We will not work without a contract," and so it created considerable

difficulty. Now, that is where this "sweetheart" contract business came into being.

In order to go on, and miners want to work, they don't want to lay off, they may get some benefits when they are not working but they want to work, and operators want to work, and everybody wants to work.

It is just a question of how much you are going to get paid and how many benefits, as workers, you are going to have or what consideration the operators are going to have.

So, that continued under this contract. These "sweetheart" contracts, where they signed the contract and were told by the UMW that they wouldn't be enforced, that they wouldn't try to collect that off of them, and that created some confusion, some losses.

Mr. LaViers said, as he testified, he paid in several hundred thousand dollars on two or three or more million dollars into the Welfare Fund, and that he was unable to continue with it because his business could not afford to carry that and he, therefore, notified the Consolidation Coal Company, which was his sales agency, the purchaser of his coal, primarily, or handler of his coal, and he notified the Union that in sixty days he would cancel the contract, which was provided in the provisions of the contract, and he did that and proceeded then to work or to operate these mines with non-union labor, or those who were members of the Union who were willing to work or cross the picket-lines or whatever efforts were made on behalf of the UMW to discourage his operation.

[1842] Now, it is not the signing of the contract between the UMW and the Consolidation Coal Company.

There is a written contract, the one of 1958 and one of 1964. Mr. LaViers cancelled his contract in 1962 and was not operating under a wage agreement or any contract with the UMW.

In 1964 another contract was written in which the provision was that the parties said the Welfare Fund must be paid on each ton of coal mined and that those who had not been operating under the contract would pay 80 cents a ton.

Mr. LaViers here says, admitting that contract to be a lawful contract between the parties, that under the terms of the anti-trust law their arrangement monopolized the field, and that he was unable to meet the conditions of the contract and to compete with this, as he says, "unlawful arrangement" between the workers and management, represented by the UMW and the Consolidation Coal Company in this lawsuit.

The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself; but if it was entered into with the intention on the part of the signatories—the two defendants here—to injure the plaintiff, if they had that in mind, that "we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation."

So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?

[1843] Conspiracies are seldom capable of proof by direct testimony and it is settled law that they may be inferred from the action of the parties.

Circumstantial evidence of the existence of the conspiracy may be sufficiently strong to raise a factual question on which you may base your verdict, even though there is no direct evidence that a conspiracy existed.

As jurors, it is your function to observe the witnesses while testifying and to appraise their credibility, to draw inferences from the facts established; to resolve conflicts in the evidence and to reach ultimate conclusions of fact.

I don't know whether I have given you the definition of a conspiracy or not. I have it here some place; anyway, I will give it to you. If I have to repeat it, I will ask your indulgence.

A conspiracy sounds like a legal term, a legalistic term. It is a common-sense, every-day word, as a matter of fact.

Conspiracy, I think, is pretty well understood by each of you, generally understood, but in this case a conspiracy is an agreement between two or more persons to do an unlawful and commit an unlawful act or commit a lawful act in an unlawful way. In other words, it is simply this: Two or more people, or in this case, corporate entities, agree to enter into an arrangement to put the plaintiff out of business, or seriously hamper

its operations, which is, under the law, a wrongful act, for which the defendants may be held accountable in damages.

The South-East Coal Company claims—I have it right here. I am sorry. I was just about to read it when I took off and said it, but I will read it again.

The South-East Coal Company claims that it has been injured and thereby damaged by the unlawful joint acts of the defendants, United Mine Workers of America and the Consolidation Coal Company. This alleged wrongful action is that the two defendants had been guilty of a conspiracy against the plaintiff.

[1844] A conspiracy is an arrangement or an agreement or plan between two or more individuals or, as in this case, corporate entities, to commit an unlawful act, or to commit a lawful act, in an unlawful way.

In other words, the plaintiff claims that this coal company, through its officers and agents, had a plan or an agreement, the officers and agents of the labor union, to require all coal producers in Eastern Kentucky coal fields to execute a contract with the United Mine Workers requiring the payment of 40 cents a ton for each ton of coal produced by the coal operator, with the knowledge that the plaintiff could not meet the requirement of the 40 cents per ton, and economically survive in the coal-producing business.

You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, in-

cluding the plaintiff, out of business, injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

If you do not so believe, you will find for the defendants.

The contract about which you have heard so much during the introduction of evidence was executed originally in 1950, between the United Mine Workers as a bargaining agent for its coal miner membership. This contract is referred to in the evidence as the National Bituminous Coal Wage Agreement of 1950. This contract was re-executed from time to time, with varying changes, and finally culminated in the contract effective April 2, 1964, which is the bassi [sic.] of this lawsuit and is the contract which the plaintiff here says that it is unable to comply with.

[1845] This contract has this clause:

"During the life of this agreement there shall be paid into such Fund by each operator signatory hereto the sum of forty cents per ton of two-thousand pounds on each ton of bituminous coal produced by such operator for use or for sale. On all bituminous coal procured or acquired by any signatory operator for use or for sale, that is, all bituminous coal other than that produced by such signatory operator, there shall, during the life of this agreement, be paid into such Fund, by each such operator signatory thereto, or by any subsidiary or affil-

iate of such operator signatory hereto the sum of eighty cents per ton of two thousand pounds on each ton of such bituminous coal so procured or acquired, on which the aforesaid sum of forty cents per ton had not been paid into said Fund prior to such procurement or acquisition."

In other words, it is claimed by the plaintiff that the defendants fixed the wages and Welfare Fund royalties so high in 1950 by the National Bituminous Coal Wage Agreement and the amendments thereto that the small companies, including this plaintiff, could not pay them and continue to operate successfully.

And that the defendants knew that the small companies, including the plaintiff, could not pay the fixed wages and Welfare Fund royalties, and that thereby the trade and competition offered by the small companies, including the plaintiff, to the larger coal producing companies, including the defendant Consolidation Coal Company, would be eliminated by putting the small companies, including the plaintiff, out of business.

It is for you to determine from all the evidence and all reasonable inferences which may be drawn from the evidence whether or not these defendants had such an agreement or meeting of the minds for the intent and purpose of unreasonably restraining trade and monopolizing the coal industry in the eastern Kentucky locality by driving [1846] the small companies, including the plaintiff, out of business.

You are instructed that the execution of the written contract is not of itself or per se a violation of the law.

In order for the contract to be unlawful you must believe that its execution by the defendants was for the

purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff.

A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union's interest, seek to obtain the same terms from other employers; but a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit.

One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it becomes a party to the conspiracy.

This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment for the remaining employees and employer in the industry.

It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on differences in such standards.

This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.

The union has a duty to bargain unit by unit in order to best serve its obligations to its members.

The Union should retain the ability to respond to each bargaining situation as the individual circum-

stances might warrant without being strait-jacketed by some prior agreement with favored employers.

In other words, the plaintiff here contends that they had given him, as a smaller operator, certain concessions and [1847] not require [sic.] the stringency of the contract which they had with all the operators who were able to live under that contract, and that he could have survived and, to the best interests of himself and members of the UMW who worked for him.

Wage differentials should not be the basis for affording to one operator a competitive advantage over another.

To sum up what I have said, if you believe from all the evidence and all reasonable inferences that might be drawn from the evidence that the defendant Consolidation Coal Company, as the employer, and the defendant United Mine Workers, as the employee, with the intention of putting the plaintiff out of business, entered into an industry-wide agreement that exceeded the financial ability of the plaintiff, then you are instructed that the defendants are guilty of violating the anti-trust laws, and that you should find for the plaintiff.

Now, the defendants here say that, admitting all of these things for the sake of argument, as we put it, whatever damage came to the plaintiff, that he was a part of it.

He can't claim anything against the coal operators because this arrangement which they had with the UMW had his approval and endorsement, that he was a member of the BCOA—Bituminous Coal Operators Association—that drew up the contract, and that he was a spon-

sor of it and, therefore, if he got hurt by it, if it was wrong, he was helping in a wrong, "impari delicto" they call it. That is equal guilt.

A person who is of equal guilt cannot claim that he has been wronged by other people who assisted or collaborated with him on the same project.

The defendants have entered the defense of "in pari delicto"—this means that the defendants say that if an unlwful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy.

Under this defense, the Court charges you that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover [1848] damages for that period of time that the plaintiff remained a party to the conspiracy.

Now, a person may be a party to such an arrangement, be "in pari delicto," but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of getting other operators out of business, yet, if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy.

Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff

withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal.

Now, the plaintiff contends two theories to this:

The plaintiff contends that the defendant United Mine Workers of America, in combination with the Bituminous Coal Operators Association, agreed to impose the wage and royalty scale set forth in the National Agreement and upon all operators regardless of their ability to pay, and that this was implemented by the Protective Wage Clause of 1958 agreement, which had the effect of restraining and monopolizing trade in the coal industry.

Plaintiff says that by this arrangement between these two defendants they undertook to impose a standard which the Consolidation Coal Company, because of its size and because of its wealth and because of its position in the coal productive and coal handling industry, could succeed with a, what the plaintiff said is a contract that the plaintiff could not sign and survive by reason of the circumstances connected with Consolidation Coal Company, as it was able to take shorter profits or whatever might be re-[1849]quired, finance itself better, and continue to make money and, as they say, did continue to make money after the execution of this contract; but, this company, being a relatively small operation, as compared with Consolidation Coal Company, could not compete with what he calls an unlawful monopoly.

Now, that is the theory of the plaintiff.

The defendants take the position that the contract involved is an ordinary contract between the employer and employee for their mutual benefit, and with no thought or any idea of making or considering any conspiracy to injure the plaintiff or any other coal operator; that any loss of business which the plaintiff sustained — this is the contention of the defendants, their theory of the case — that any loss of business which the plaintiff sustained was not the result of the contract of employment, including the cause, the Protective Wage Clause in the contract of 1958; was not the result of that contract of employment between Consolidation Coal Company and the United Mine Workers, as bargaining agent for the miners, but was the result of either mismanagement, overexpansion, economic conditions, or a combination of these, with possibly other circumstances, to none of which either of these defendants had any part.

That is the theory of the defendants here, that by building this cleaning plant at Irvine, that there was a significant miscalculation of its cost of construction, more than a million dollars it anticipated to cost; that it was 125 miles in haul from the mines to that plant, which was an additional expense and contrary to good coal production management, and that by loss of the sales of coal through no fault of Consolidation Coal Company, but through the failure of the plaintiff to exercise orthodox business acumen; that that is what caused this plaintiff to lose money, and that through its own failures and no reason to accuse either of these defendants to have committed wrongful acts; the financial problems of the plaintiff arose from its own [1850] actions and its own failure to exercise good business judgment in the face of advice on the part of Consoli-

dation Coal Company, according to Mr. Tucker, I believe, who was the witness — is that his name?

Mr. Combs: Cassidy.

The Court: The last witness who testified.

Well, anyway, one of the witnesses for the defendant, that he was concerned about the building of this tipple and this cleaning plant, and advised the plaintiff, through its president, Mr. LaViers, and possibly others, that importation from Canada and other places and the use of gas and oil was going to reduce the coal demands thirty-three and a third per cent from that locality, or more. Notwithstanding that, this plaintiff proceeded to its development and expansion, and that these defendants were in no way responsible for it. But, due to these circumstances alone, if he had any loss, it was caused by that.

Now, if you find for the plaintiff, that is, if you find, as I have tried to give you here, and I apologize again for being somewhat repetitious, I am sure, but if you find for the plaintiff, if you believe that South-East Coal Company has been damaged, under the conditions that I say, and that is these defendants are responsible, you will award it such sum, in damages, as you believe will reasonably compensate it for any loss that you may believe it has sustained by reason of the conspiracy, if any, between the defendants, not to exceed the sum of $3,100,000.

If you believe that the evidence does not clearly show a conspiracy, as I have defined that term to you, or if you believe that even though there was such a conspiracy, it was not the proximate or contributing cause of any loss which the plaintiff may have experienced in his business, you will find for the defendants.

In fixing damages, if any, you are not to fix a sum that is speculative or unrealistic or one that is not sustained by proof. That is, you must consider all the proof in the case on the matter of loss, if any, that was sustained by [1851] the plaintiff, and fix the amount of damages in accordance with that proof.

You must understand, however, that a matter of this kind cannot be established with exactitude and you must apply common sense, and common understanding of business activities, generally, and particularly in this case, as stated from the witness stand.

Now, I have drawn here a form of verdict which has the style of the case, "South-East Coal Company against the United Mine Workers of America and Consolidation Coal Company.

"We, the jury, find for blank." I have left that blank space there. If you find for the defendants, you will write in there the word, "defendants," and have your foreman — elect one of your number as foreman — and have your foreman sign the verdict for the jury. If you find for the plaintiff, you will write in there the word, "plaintiff," and the amount, one sum. You don't have to make any description of it or why or wherefor, one sum that you think is proper, as the verdict in this case.

Gentlemen, you may approach the bench.

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[1915] The Court: Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the

plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that additional instruction as a definition for one of the terms I used in my charge.

My attention has been called to the fact that in my charge to you I stated that the Welfare Clause was incorporated in the contract between the union and the operators in 1958. That was an error on my part, and inadvertence. The Welfare Clause has been in the contract since 1946.

If I did say that, and counsel says I did, so I accept his statement on it, I will state that it was not in 1958 but in 1946 that the Welfare Clause was first incorporated into the contract.

Also I used the term, I believe, at one time of "closed shop." I referred to something as being a closed shop back in 1950, I believe. The contract provided for a closed shop. That was not correct either. That should have been union shop. It was an agreement, and the agreement was between the union and the operators, and I should have used the term "union shop" instead of closed shop.

Now, members of the jury, just a minute, please. Gentlemen, do you want to approach the bench?

* * * * * * *

[1916] The Court: I might say, members of the jury, that when I corrected my statement of using the

"closed shop" instead of "union shop," that it doesn't enter into this case one way or the other. I was merely using that as an historical background.

It is not any significant thing in the case at all. I am sure you will know. But I don't mean to emphasize it here [1917] at this time, because it has no bearing whether it is "closed" or a "union shop," on the issues to be determined here.

* * * * * * *

During the recess, bear in mind all admonitions. Don't discuss the case. Don't permit anyone to discuss it with you or in your presence or make up your minds about it in any way. Don't read any newspaper accounts or listen to any television or radio or any news media of any kind.

Avoid, insofar as you can, any persons that might inadvertently, either purposely or unpurposely, make any statement or reference about this case.

Don't talk to any members of your family. That is always an admonition, because I recognize that that is one of the most difficult things I would assume that a juror has to contend with.

It is not fair to these litigants for you to talk to anyone, members of your family or anyone.

When you come back here in the morning, the Marshal will be here. I want him to keep the courtroom closed except for the jurors. Let the jurors come into the courtroom. The courtroom will remain closed until court is ready to convene.